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**A REVIEW OF INTERNATIONAL CRIMINAL COURT  
PROCEEDINGS UNDER PART V OF THE *ROME STATUTE*  
(INVESTIGATION AND PROSECUTION) AND PROPOSALS FOR  
AMENDMENTS**

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**A REVIEW OF INTERNATIONAL CRIMINAL  
COURT PROCEEDINGS UNDER PART V OF THE  
ROME STATUTE (INVESTIGATION AND PROSECUTION)  
AND PROPOSALS FOR AMENDMENTS**

*V. C. Lindsay\**

Entitled “Investigation and Prosecution”, Part V of the *Rome Statute of the International Criminal Court*<sup>1</sup> covers the two phases of judicial proceedings which are held in the ICC pre-trial chambers: (1) the investigations phase, which involves provisions relating to the initiation of investigations and the issuance of arrest warrants (Articles 53 to 58); and (2) the detention and charging phase, which includes provisions governing provisional release and the confirmation of charges (Articles 59 to 61). Thus far, most of the work of the Court has involved proceedings under Part V. Numerous investigations have been conducted, four persons have been arrested<sup>2</sup> and others have surrendered.<sup>3</sup> Charges have been confirmed in three cases<sup>4</sup> and denied in one case.<sup>5</sup>

The evaluation of Part V of the *Rome Statute* is presented in two sections. The first section consists of an overview of Part V provisions in light of the jurisprudence of the Pre-Trial Chamber. It focuses on the evolving roles of the Prosecutor and the Pre-Trial Chamber during the investigative phase and on the predominance of the Pre-Trial Chamber in the charging phase. The second part critically appraises the merits of recently published proposals for reforming Pre-Trial Chamber proceedings in light of the experience gained. This section also includes my own suggestions for reform. The adoption of regulations is suggested as an efficient avenue to address deficiencies relating to the disclosure of (1) arrest warrant materials and (2) the proposed charges. Amendments would limit the discretion given to Pre-

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<sup>1</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002) [*Rome Statute*].

<sup>2</sup> *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07; and *Prosecutor v Jean Pierre Bemba Gombo*, ICC-01/05-01/08.

<sup>3</sup> *Prosecutor v Bahr Idriss Abu Garda*, ICC-02/05-02/09.

<sup>4</sup> Decision on Confirmation of Charges, ICC-01/04-01/06-803, *Lubanga* (29 January 2007); *Decision on Confirmation of Charges* ICC-01/04-01/07-717, *Katanga and Ngudjolo* (30 September 2008).

<sup>5</sup> Decision on Confirmation of Charges, ICC-02/05-02/09, *Bahar Idriss Abu Garda* (8 February 2010). Leave to appeal this decision was denied on 23 April 2010, ICC-02/05-02/09-267. Since the writing of this article, two additional suspects have appeared in response to summonses issued in connection with the situation in Darfur, Sudan: Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-2 and Saleh Mohammed Jerbo Jamus, ICC-02/05-03/09-3.

Trial Chambers to conduct their own investigation of evidence which is not exculpatory and is not relied on by the parties, with the goal of ensuring equal treatment and equal justice for persons appearing before different Pre-Trial Chambers.

## I. Investigations (Articles 53 to 58)

### A. The Role of the Prosecutor

Under the Rome Statute, the responsibility for investigations is given to the Prosecutor.<sup>6</sup> Although the triggering mechanisms for beginning an investigation are not part of Part V, they may affect the scope of certain investigations.<sup>7</sup> For example, under Article 13, a State Party or the United Nations Security Council may refer only a situation, not a specific case. However, when an investigation is triggered by an *ad hoc* referral from a non-member state, under Article 12(3), the referring state may limit its acceptance of the Court's jurisdiction to a specific case.

The self-referrals by the Democratic Republic of Congo and the Central African Republic were both made by way of letters referring the situation.<sup>8</sup> However, the self-referral from Uganda in December 2003, referred to "the situation concerning the Lord's Resistance Army."<sup>9</sup> The Prosecutor has indicated that the Ugandan referral "was interpreted in light of the principles of the *Rome Statute* as referring to crimes by any group in Northern Uganda."<sup>10</sup>

In any event, once an investigation is opened, the Prosecutor is obliged to "establish the truth" and to "investigate incriminating and exculpatory circumstances equally."<sup>11</sup> This creates an affirmative duty to both identify and disclose exculpatory evidence, and if the duty is faithfully carried out, will help to limit the extent to which prosecutions may become politicized. The balancing act which must be carried out by the Prosecutor in choosing situations to investigate and cases to prosecute is a

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<sup>6</sup> *Rome Statute*, *supra* note 1 at Article 42 (The Office of the Prosecutor) provides that: "The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court...". See also Article 13 (Exercise of Jurisdiction) and Article 54 (Duties and Powers with Respect to Investigations).

<sup>7</sup> See generally Hector Olasolo, *The Triggering Procedure of the International Criminal Court* (Leiden: Martinus Nijhoff, 2005).

<sup>8</sup> OTP, Press Releases, *Prosecutor receives referral of the situation in the Democratic Republic of Congo*, ICC-OTP-20040419-50 (19 April 2004) and *Prosecutor receives referral concerning Central African Republic*, ICC-OTP-20050107-86 (1 July 2005).

<sup>9</sup> OTP, Press Release, *President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC*, ICC-20040129-44 (29 January 2004).

<sup>10</sup> ICC OTP, "[Draft] Criteria for selection of situations and cases" (June 2006) at note 2 ["Draft Criteria"]. See also *Regulations of the Office of the Prosecutor*, ICC-BD/05-01-09, at Chapter 3, section 4. The regulations entered into force on 23 April 2009.

<sup>11</sup> *Rome Statute*, *supra* note 1 at Article 54(1)(a) contains a duty to investigate "incriminating and exonerating circumstances equally."

challenging one.<sup>12</sup>

The Prosecutor has identified three essential principles which lie at the core of his strategy: (1) positive complementarity; (2) focused investigations and prosecutions; and (3) maximizing the impact of their work.<sup>13</sup> These criteria affect not only the selection of situations for investigation, but also the selection of cases for prosecution.

# 1. SELECTION OF SITUATIONS FOR INVESTIGATION

When the Prosecutor receives a referral from a State Party or the Security Council, Article 53 provides that the Prosecutor *shall* initiate an investigation unless he determines that there is no reasonable basis to proceed.<sup>14</sup> If the Prosecutor decides against opening a full investigation of a referral, he must "promptly" inform the referring State in writing.<sup>15</sup> The decision to not investigate is subject to review by the Pre-Trial Chamber on its own motion or at the request of the State Party,<sup>16</sup> and victims have a right to present their views on the matter.<sup>17</sup> The duty to notify victims is laid upon the Court and not the Prosecutor, and it extends only to those who have been granted standing to participate and those who have already communicated with the Court.<sup>18</sup>

The Prosecutor may also initiate an investigation *proprio motu* if he first

<sup>12</sup> See Dov Jacobs, "A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase" (2007) 6 *The Law and Practice of International Courts and Tribunals* 317, where he writes: "During the formal investigative phase, the OTP needs to carry out its duties independently from a financial and political perspective, while trying to obtain the cooperation of States without which no investigations will be possible, respecting the rights of the Defence and the views of the victims."

<sup>13</sup> ICC-OTP, *Report on Prosecutorial Strategy* (14 September 2006) at 4-6.

<sup>14</sup> See *Rome Statute*, *supra* note 1, Article 53 (Initiation of an investigation). In addition, Article 12(3) provides that a State which is not a Party to the *Statute* may lodge a declaration with the Registrar accepting the Court's jurisdiction. See also International Criminal Court, "Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court", Press Release, ICC-20050215-91-En, 15 February 2005. On 21 January 2009, the Palestinian Authority issued a declaration recognising the jurisdiction of the International Criminal Court pursuant to Article 12(3), which allows non-Member States to submit to the jurisdiction of the ICC on an *ad hoc* basis. The ICC Prosecutor announced on 4 February 2009, that he is examining whether he should initiate an investigation into possible violations of the Rome Statute. See John Quigley, "The Palestinian Declaration to the International Criminal Court: The Statehood Issue" (2009) 35 *Rutgers Law Record* 1.

<sup>15</sup> *ICC Rules of Procedure and Evidence [ICC RPE]* at Rule 105(1). Normally these letters are treated confidentially, although the Prosecutor published two letters on the Court's website declining to open investigations. See Office of the Prosecutor, Response to communications received concerning Iraq, (9 February 2006) <[http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf)> (accessed: 27 July 2010); Office of the Prosecutor, Response to communications received concerning Venezuela, (9 February 2006) <[http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP\\_letter\\_to\\_senders\\_re\\_Venezuela\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf)> (accessed: 27 July 2010).

<sup>16</sup> *Rome Statute*, *supra* note 1 at Article 53.

<sup>17</sup> *ICC RPE*, *supra* note 15 at Rule 92(2).

<sup>18</sup> *Ibid.* at Rule 92(2).

concludes there is a reasonable basis to proceed and then seeks authorization to open a full investigation from the Pre-Trial Chamber.<sup>19</sup> When he submits such a request, he has a duty to notify “victims” so that they “may make representations to the Pre-Trial Chamber.”<sup>20</sup> This is a broad duty which extends to “victims, known to [the Prosecutor] or to the Victims and Witnesses Unit, or their legal representatives.” The rules allow the Prosecutor to “give notice by general means in order to reach groups of victims” and to seek the assistance of the Victims and Witnesses Unit (VWU) in efforts to provide notice.<sup>21</sup> However, the Prosecutor has yet to submit such a request, instead pursuing a strategy of encouraging self-referrals by Member States. Thus he avoids both the duty to notify victims and the requirement that he seek approval for the investigation from the Pre-Trial Chamber.

The decision whether to open a formal investigation involves progressive levels of analysis of the referrals and communications received.<sup>22</sup> First, there is a preliminary analysis which begins with an initial, superficial review of the referring documents to determine whether the basic jurisdictional requirements are met, including sufficient gravity of the crimes, the interests of justice being met and the status of any complementary jurisdiction.<sup>23</sup> Then, a simple factual and legal analysis of the referral or communication is conducted based on the information supplied and other readily available public information. Finally, a third level of intensive analysis is completed prior to reaching a final decision on whether to open a formal investigation.<sup>24</sup>

As of March 2009, four investigations have been officially opened: the Democratic Republic of Congo,<sup>25</sup> Uganda,<sup>26</sup> Sudan<sup>27</sup> and most recently, the Central African Republic.<sup>28</sup> In meetings with civil society held in February 2006, the Prosecutor reported that seven situations were being subjected to preliminary analysis and that ten situations had proceeded to the more intensive third phase of analysis. In

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<sup>19</sup> *Rome Statute*, *supra* note 1 at Article 15. The last report from the Prosecutor on communications reveals that the Office has received over 7900 communications from more than 170 countries since July 2002.

<sup>20</sup> *Rome Statute*, *ibid.* at Article 15(3); *ICC RPE*, *supra* note 15 at Rule 50(1).

<sup>21</sup> *ICC RPE*, *ibid.* at Rule 50(1).

<sup>22</sup> “Draft Criteria”, *supra* note 10.

<sup>23</sup> *Ibid.* at 4. In February 2006, the Prosecution reported that a facial review of the communications received revealed that eighty percent of the communications failed to come within the Court’s temporal or subject matter jurisdiction. “Update on communications received by the Prosecutor” (10 February 2006) at 1.

<sup>24</sup> ICC-OTP, “Draft Criteria”, *supra* note 10 at 4-5.

<sup>25</sup> “The Office of the Prosecutor of the International Criminal Court opens its first investigation”, ICC Press Release, ICC-OTP-20040623-59 (23 June 2004).

<sup>26</sup> “Prosecutor of the International Criminal Court opens an investigation into Northern Uganda”, ICC Press Release, ICC-OTP-20040729-65 (27 July 2004).

<sup>27</sup> “The Prosecutor of the ICC opens investigation in Darfur”, ICC Press Release, ICC-OTP-0606-104 (6 June 2005).

<sup>28</sup> “Prosecutor opens investigation in the Central African Republic”, ICC Press Release, ICC-OTP-20070522-220 (22 May 2007).

March, he reported that Afghanistan,<sup>29</sup> Colombia,<sup>30</sup> Cote d'Ivoire,<sup>31</sup> Georgia,<sup>31</sup> Kenya,<sup>32</sup> and the Palestinian Authority<sup>33</sup> were all being subjected to preliminary analysis.

In the early days, the fact that a State was being analyzed was not publicized, unless the matter was already widely known, or if there was a decision not to investigate, as with the decisions in relation to Iraq<sup>34</sup> and Venezuela.<sup>35</sup> More recently, a public approach has become the norm in hopes that by announcing that a situation is being monitored, crimes will be prevented and national prosecutions will be encouraged.<sup>36</sup>

## 2. SELECTION OF CASES FOR PROSECUTION

Once an investigation is commenced, the evidence will eventually point to a number of individuals. The few who can be prosecuted by the ICC are chosen from this group. The Office of the Prosecutor (OTP) has said it "will bring a relatively limited number of cases that are representative of the overall scope of the crime,

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<sup>29</sup> OTP, Press Release ICC-OTP-20080821-PR347-ENG, "ICC Prosecutor visits Columbia" (21 August 2008), referring to "ongoing examination of the investigations and proceedings in Colombia, focusing particularly on the people who may be considered among those most responsible for crimes within the jurisdiction of the ICC".

<sup>30</sup> OTP, Press Release ICC-20050215-91-En, "Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court" (15 February 2005).

<sup>31</sup> ICC-OTP, Press Release ICC-OTP-20080820-PR346 ENG, "ICC Prosecutor confirms situation in Georgia under analysis" (20 August 2008).

<sup>32</sup> ICC-OTP, "ICC Prosecutor reaffirms that the situation in Kenya is monitored by his office" (11 February 2009); "Annan hints at ICC Kenyan trial", *BBC News*, (13 February 2009) Online: BBC News <<http://news.bbc.co.uk/2/hi/africa/7887824.stm>>. A Kenyan coalition government of national unity created the Commission of Inquiry on Post-Election Violence (the Waki Commission), which issued a report in October 2008 recommending a series of reforms and the establishment of a hybrid tribunal of international and Kenyan judges to investigate and prosecute those most responsible for the post-election violence which occurred in early 2008. It set a deadline of 30 January 2009 for the Tribunal to be established, after which the mediator—Kofi Annan—would be required to pass a sealed envelope with the names of chief suspects to the International Criminal Court (ICC). However, at the time of writing, no list has yet been given to the Prosecutor. Notably, if the sealed envelope were provided, the provision of the list of names in such a fashion does not amount to a referral by a State Party.

<sup>33</sup> On 22 January 2009, the Palestinian Authority issued a declaration recognising the jurisdiction of the International Criminal Court pursuant to Article 12(3), which allows non-Member States to submit to the jurisdiction of the ICC on an *ad hoc* basis. The ICC Prosecutor announced on 4 February 2009 that he is examining whether he should initiate an investigation into possible violations of the *Rome Statute*. The Palestinian declaration raises the issue of whether Palestine is a state, and if not, whether it may nonetheless recognise the jurisdiction of the ICC.

<sup>34</sup> Letter from Prosecutor Moreno-Ocampo (9 February 2006), explaining that a preliminary analysis of the situation in Iraq failed to establish crimes of the necessary gravity to justify seeking leave to use his *proprio motu* powers.

<sup>35</sup> Letter from Prosecutor Moreno-Ocampo (9 February 2006), explaining that a preliminary analysis of the situation in Venezuela failed to establish certain jurisdictional prerequisites necessary to allow the Prosecutor to seek leave to exercise his *proprio motu* powers.

<sup>36</sup> See e.g., Press Release, *No impunity for crimes committed in Georgia: OTP concludes second visit to Georgia in context of preliminary examination*, ICC-OTP-20100625-PR551 (25 June 2010).

against those bearing the greatest responsibility for the most serious crimes.”<sup>37</sup> Although the Prosecutor has claimed to focus on those who bear the greatest responsibility, this has not always seemed to be the case.

The Prosecutor may apply for an arrest warrant at any time after he begins an investigation. His application for an arrest warrant must convince the Pre-Trial Chamber that there are “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.”<sup>38</sup> When the Prosecutor applied for an arrest warrant for Bosco Ntanganda, who was allegedly involved in war crimes in the Democratic Republic of the Congo, Pre-Trial Chamber I denied the application, applying a three-part test to determine whether the allegations were sufficiently grave.<sup>39</sup> However, this decision was reversed by the Appeals Chamber in a decision which rejected the three-part test entirely. It held that any admissibility inquiry was improper in the context of an arrest warrant application unless a State Party or a suspect raised the issue as permitted under the Statute, or there were other special circumstances not existing in the Ntanganda application.<sup>40</sup>

Thus far, the Prosecutor has successfully applied for at least thirteen arrest warrants, four of which have now been executed.<sup>41</sup> The Prosecutor’s request for an arrest warrant for President al-Bashir of Sudan was only partially granted by Pre-Trial Chamber I. The allegations of war crimes and crimes against humanity were found to be supported by enough evidence, but the decision on the arrest warrant was denied, with one judge dissenting, because the majority found the evidence insufficient to

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<sup>37</sup> ICC-OTP, “Draft Criteria”, *supra* note 10 at 10.

<sup>38</sup> See *Rome Statute*, *supra* note 1, Article 58(1). The language used there is similar to that found in Rule 47 of the *ICTY Rules of Procedure and Evidence*, also dealing with Indictments. Pre-Trial Chamber I held that in determining whether the criteria of Article 58(1) are met (whether there are reasonable grounds to believe that the person has committed a crime falling under the *Rome Statute*), “the Chamber will be guided by the ‘reasonable suspicion’ standard under Article 5(l)(c) of the *European Convention on Human Rights* and the jurisprudence of the Inter-American Court of Human Rights on the fundamental right to personal liberty under Article 7 of the *American Convention on Human Rights*.” Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1, *Lubanga*, (1 May 2007). Decision on Reviewing the Indictment, IT-95-14-I, *Kordic* (30 September 1998). The ICTY interpreted the phrase as requiring a *prima facie* case. It has been argued that because Rule 58 of the *Rome Statute* refers to a “person” rather than to a “suspect” (as in the *ICTY Statute*), that this might be interpreted to allow a person to be arrested on less than a *prima facie* case. Olivier Fourmy, “Powers of the pre-trial chambers” in Antonio Cassese *et al.*, eds., *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2 (Oxford University Press, 2002) at 1219-20.

<sup>39</sup> Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, ICC-01/04-02/06-20-Anx2, *Situation in Democratic Republic of Congo*, Pre-Trial Chamber I (10 February 2006). For criticism of this requirement, see Smith, “Inventing the Laws of Gravity: The ICC’s Initial *Lubanga* Decision and its Regressive Consequences” (2008) 8 *International Criminal Law Review* 331.

<sup>40</sup> Judgement on the Prosecutor’s appeal against the Decision of Pre-Trial Chamber I entitled *Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58*, ICC-01/04-169, *Situation in Democratic Republic of Congo* (13 July 2006).

<sup>41</sup> Those currently in the custody of the ICC include Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, and Jean-Pierre Bemba Gombo.

support allegations of specific intent to commit genocide.<sup>42</sup> The Prosecutor has requested leave to appeal the portion of the decision denying genocide as a basis for the arrest warrant.<sup>43</sup>

Once an arrest warrant is obtained, it must be executed. This is the Court's greatest legal limitation.<sup>44</sup> It is the job of the Prosecutor to secure the cooperation of the States Parties in executing arrest warrants.<sup>45</sup> Although States Parties have a duty to cooperate under Article 86 of the *Statute*,<sup>46</sup> there are no enforcement mechanisms in the *Statute*. The first person to appear before the Court had already been arrested in a different context when he was transferred to the Court on the basis of allegations involving the recruitment and use of child soldiers in combat activities.<sup>47</sup> The Prosecution has sometimes justified the selection of the Lubanga case because of the possibility of having a "high-impact" in the battle to stop the use of child soldiers,<sup>48</sup> but it may be that the real reason Lubanga is the first person to be tried at the ICC is the Court's lack of its own police powers, making the opportunity created by Mr. Lubanga's arrest in a different context a determining factor.<sup>49</sup> Although the arrest warrants for Joseph Kony and the other Lord's Resistance Army rebels were listed on Interpol's Red Notice list since 1 June 2006, they have not yet been arrested.<sup>50</sup> Likewise, the arrest or surrender of the President of Sudan does not appear likely in the near future.

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<sup>42</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-3, *Situation in Darfur, Sudan*, Pre-Trial Chamber I, (4 March 2009), para. 202-07. The dissenting opinion would treat inferences drawn from circumstantial evidence as reasonable, so long as the inference is one of several possible inferences which could be drawn, whereas the majority required that the inference be the only reasonable one based on the evidence upon which the Prosecutor relied.

<sup>43</sup> Prosecution's Application for Leave to Appeal *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-12, *Situation in Darfur, Sudan*, Pre-Trial Chamber I (13 March 2009).

<sup>44</sup> William W. Burke-White "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice" (2008) 49 Harv. Int'l L.J. 48 at 65.

<sup>45</sup> Dov Jacobs, *supra* note 12 at 334, where the author notes "the success of the ICC will depend on the capacity of the OTP to obtain the cooperation of the State parties, especially those where the crimes have been committed."

<sup>46</sup> *Rome Statute*, *supra* note 1 at Articles 86 and 89, which provide a general obligation of cooperation and impose an obligation for states to arrest.

<sup>47</sup> *Warrant of arrest*, ICC-01/04-01/06-2-tEN, *Lubanga*, (10 February 2006, published on 3 April 2006 pursuant to decision ICC-01/04-01/06-37).

<sup>48</sup> See e.g., Office of the Prosecutor, *Report on Prosecutorial Strategy* (14 September 2006) at 4.

<sup>49</sup> This tactic is not without precedent. The first defendant to appear before the Yugoslav Tribunal was Dusko Tadic, who was already in custody in Germany on a different matter before being transferred to The Hague. See *Prosecutor v. Dusko Tadic*, Case No. 94-1-T, Opinion and Judgement, (7 May 1997) at para. 6.

<sup>50</sup> "Interpol issues first ICC Red Notice", ICC-OTP-20060601-138. In May 2006, the OTP and Interpol signed a Co-operation Agreement "to establish a framework for co-operation between the Parties in the field of crime prevention and criminal justice, including the exchange of police information and the conduct of criminal analysis, the search for fugitives and suspects, the publication and circulation of Interpol notices, the transmission of diffusions, and access to the Interpol telecommunications network and databases." Article 1, *ICC-Interpol Co-operation Agreement*, May 2006.



## B. The Role of the Pre-Trial Chamber during an Investigation

In general, the Pre-Trial Chamber does not play an active role in the investigation. However, there are some important exceptions to this general rule.

### 1. UNIQUE INVESTIGATIVE OPPORTUNITIES AND THE APPOINTMENT OF *AD HOC* DEFENCE COUNSEL

The Pre-Trial Chamber has the power to take steps to preserve the rights of the Defence in two ways. Firstly, it may act when unique investigative opportunities arise.<sup>51</sup> For example, when forensic issues arose in connection with an investigation in the Democratic Republic of Congo, the Pre-Trial Chamber responded by appointing an *ad hoc* Defence Counsel.<sup>52</sup>

The Pre-Trial Chamber may also appoint *ad hoc* Defence counsel to represent the general interests of the Defence. *Ad hoc* Defence counsels have been appointed to respond to *amicus curiae* observations.<sup>53</sup> Defence counsels have also been appointed to respond to applications from individuals wishing to participate as victims in the proceedings. This role comes despite the fact that the Office of Public Counsel for the Defence already plays a role in the processing of applications from individuals wishing to be recognised as victims.<sup>54</sup> An *ad hoc* Defence Counsel's mandate is strictly limited by the language used in the decision assigning counsel. Unless expressly included in the mandate, challenges to jurisdiction are outside the scope of an *ad hoc* Defence counsel's remit.<sup>55</sup>

### 2. SUPERVISING THE PARTICIPATION OF VICTIMS

A Pre-Trial Chamber has the power to grant applications by victims to participate in the investigation in either generally in a situation, in a specific case, or in both.<sup>56</sup> The Chamber makes this decision based upon Article 68(3), which provides

<sup>51</sup> *Rome Statute*, *supra* note 1 at Article 56 (Role of the Pre-Trial Chamber in relation to a unique investigative opportunity); *ICC RPE*, *supra* note 15 at Rule 114 (Unique investigative opportunity under Article 56); Court Regulation 76 (Appointment of Defence counsel by a Chamber).

<sup>52</sup> Decision to Hold Consultation under Rule 114, ICC-01/04-19, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I (21 April 2005).

<sup>53</sup> Decision of the Registrar Appointing Mr. Hadi Shalluf as *ad hoc* Counsel for the Defence, ICC-02/05-12, *Situation in Darfur, Sudan*, Pre-Trial Chamber I (28 August 2006).

<sup>54</sup> Decision authorizing the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06, ICC-02/05-74, *Situation in Darfur, Sudan*, Pre-Trial Chamber I (23 May 2007).

<sup>55</sup> Décision relative aux conclusions aux fins d'exception d'incompétence et d'irrecevabilité, ICC-02/05-34, *Situation in Darfur, Sudan*, Pre-Trial Chamber I, 23 November 2006. See also Decision on the admissibility of the case under Article 19(1) of the *Statute*, ICC-02/04-01/05-377, *Kony, et als.*, Pre-Trial Chamber II (10 March 2009) at para. 30-2.

<sup>56</sup> Decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, ICC-01/04-101-Corr, *Situation in the Democratic Republic of Congo* (17 January 2006) at para. 66; see also Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court

that “[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

Victims who are granted standing to participate must seek further authorisation from the Pre-Trial Chamber in order to establish the modalities of their participation.<sup>57</sup> Under Rule 93, a Chamber is authorised to “seek the views of victims or their legal representatives [participating in proceedings] on any issue, including,” decisions by the Prosecutor not to investigate a situation referred by a State Party or the UN Security Council.<sup>58</sup> However, the Pre-Trial Chamber has discretion to decide whether to allow participation by victims. For example, in the situation of the Central African Republic, no victim participation has been permitted to date.

### 3. SUPERVISING PROSECUTORIAL DISCRETION

Despite its minor role during the investigation, the Pre-Trial Chamber plays an important supervisory role over Prosecutorial discretion.<sup>59</sup> This role is most clearly illustrated in the two ways already mentioned – reviewing participation applications by victim, and establishing the modalities of their participation. Additionally, if the Prosecutor wishes to open an investigation on his own initiative under Article 15, he must first seek leave of the Pre-Trial Chamber. The Pre-Trial Chamber is also responsible for determining if there is sufficient evidence to support an arrest warrant or a summons to appear under Article 58.<sup>60</sup> Further, it may request additional information before granting an arrest warrant.<sup>61</sup> There has been only one instance

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and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-01/04-417, *Situation in the Democratic Republic of Congo* (07 January 2007) at para. 3; Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-02/05-110, *Situation in Darfur, Sudan* (3 December 2007).

<sup>57</sup> See generally, International Federation for Human Rights, *Victims' Rights Before the International Criminal Court : A Guide for Victims, their Legal Representatives and NGOs* (2007) Online: <<http://www.fidh.org/Victims-Rights-Before-the-International-Criminal>> (accessed: 28 July 2010).

<sup>58</sup> ICC RPE, *supra* note 15 at Rules 107 and 109. Review under Rule 107 is triggered by a request for review by the referring State Party or the Security Council, and Rule 109 allows the Pre-Trial Chamber to undertake review on its own initiative when the prosecutor's decision to not investigate is based solely upon the interests of justice.

<sup>59</sup> David Scheffer, “A review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence” (2009) 21 *Leiden J. Int'l L.* at 152-3. The article recounts that during negotiations, the fight against allowing *proprio motu* powers for the prosecutor was lost, and so negotiators focused on creating a strong pre-trial chamber to act as a check on the prosecutor.

<sup>60</sup> *Rome Statute*, *supra* note 1 at Article 58(1) sets the standard for issuance of an arrest warrant. It requires the Pre-Trial Chamber to be satisfied that there are “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” and the arrest appears necessary to ensure the person's appearance at court or to prevent obstruction or endangerment of the investigation or to prevent further crimes from being committed.

<sup>61</sup> See e.g., Decision requesting additional information and supporting materials, ICC-02/05-166, *Situation in Darfur, Sudan* (9 December 2008); *Décision demandant des éléments justificatifs*

where an application for such a warrant was denied in full, and that decision was reversed on appeal.<sup>62</sup> Upon remand, the arrest warrant was issued.<sup>63</sup> The Prosecutor has requested leave to appeal the Pre-Trial Chamber's denial of his request for a single genocide charge in the arrest warrant for Omar al-Bashir, the President of Sudan.<sup>64</sup> At the time of writing, the request for leave to appeal has been pending for 90 days.

Court Regulation 48 provides that the Pre-Trial Chamber may request specific or additional information if it considers it necessary in order to exercise its functions and responsibilities set forth in Article 53(3)(b) (review of decision not to investigate in the interests of justice), Article 56(3)(a) (unique investigative opportunities) and Article 57(3)(c) (witness protection). The Pre-Trial Chamber asserted its supervisory powers by requesting an update from the Prosecutor in the preliminary evaluation of the Situation in the Central African Republic (CAR). The Prosecutor had received a referral from the Government of the CAR on 22 December 2004; and then almost two years passed without any action from the Prosecutor.<sup>65</sup> The Pre-Trial Chamber eventually issued a decision noting that the Prosecution had failed to notify promptly the Government of the CAR and requesting a report from the Prosecutor containing information on the current status of the preliminary examination. This report was to include a tentative schedule of when it would be concluded and when a decision would be made regarding whether to pursue an investigation or not.<sup>66</sup>

The Prosecutor responded by filing a report for purposes of "transparency." However, his report cautioned that no decision had yet been taken, that the Statute imposed no time limit for doing so, and that until a decision was taken, there was no duty to report promptly.<sup>67</sup> The Prosecutor asserted that by filing the report, he was "neither accepting the existence of a legal obligation to submit this type of information absent any decision under Article 53 being made, nor adopting a precedent that it may follow in future cases."<sup>68</sup> Moreover, he "expressly reserve[d]" his position on "the proper scope of the legal provisions cited by the Chamber in its

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supplémentaires à l'appui de la requête de l'Accusation aux fins de délivrance d'un mandat d'arrêt à l'encontre d'Omar Hassan AlBashir, ICC-02/05-160, *Situation in Darfur, Sudan* (15 October 2008).

<sup>62</sup> Judgement on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled *Decision on Prosecutor's application for Warrants of Arrest, Article 58*, ICC-01/04-169-US-Exp, *Situation in the Democratic Republic of Congo* (13 July 2006, reclassified as public on 23 September 2008).

<sup>63</sup> Warrant of arrest, ICC-01/04-02/06-2-US, *Ntaganda*, Pre-Trial Chamber I (24 August 2006, reclassified as public on 28 April 2008).

<sup>64</sup> Prosecution's Application for Leave to Appeal the *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09, *Al-Bashir* (13 March 2009).

<sup>65</sup> See Prosecution's Report Pursuant to Pre-Trial Chamber III's, *Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic*, ICC-01/05-7, para. 4 (15 December 2006) [Prosecution's Report].

<sup>66</sup> *Decision Requesting Information on the Status of the Preliminary Examination of the Situation of the Central African Republic*, ICC-01/05-6, Pre-Trial Chamber III, (30 November 2006).

<sup>67</sup> Prosecution's Report, *supra* note 65 at para. 11.

<sup>68</sup> *Ibid.*

30 November 2006 Decision, the division of competences between the OTP and Pre-Trial Chambers, and the rights of States who have referred Situations to the Court.”<sup>69</sup>

The first arrest warrant in the CAR Situation was issued on 23 May 2008.<sup>70</sup>

## II. Prosecution (Articles 59 to 61)

The second half of Part V deals with “prosecution”, or more accurately, with “charging.” The process of charging a person begins with that person’s initial appearance before the Pre-Trial Chamber<sup>71</sup> and continues until there is a decision on the confirmation of charges.<sup>72</sup> After, the case is transferred to a Trial Chamber where a plea is entered for the first time and a genuine pre-trial phase begins.<sup>73</sup>

Beginning with the initial appearance, the Pre-Trial Chamber becomes more active. In their own estimation, they become a central force for discovering the truth.<sup>74</sup> Under Article 61(3) and applicable rules and regulations, the Pre-Trial Chamber oversees preparations for the confirmation of charges hearing, including the Prosecution’s delivery of the charging document and disclosure of evidence to be relied upon at the hearing.<sup>75</sup> The Pre-Trial Chamber also conducts periodic review of the release or detention of the arrested person.<sup>76</sup>

### A. The Charging Document

A person brought before the ICC is not notified of the charges against him until a date set by the Pre-Trial Chamber, which need only be “a reasonable time before the [confirmation of charges] hearing.” The date for the hearing must be set by

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Mandat d’arrêt à l’encontre de Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1, *Bemba*, Pre-Trial Chamber III (23 May 2008).

<sup>71</sup> *Rome Statute*, *supra* note 1 at Article 60 (Initial proceedings before the Court).

<sup>72</sup> *Rome Statute*, *ibid.* Article 61 (confirmation of the charges before Trial) is the final Article in Part V of the Statute. Under Article 60(11), once charges are confirmed, the Presidency of the Court is responsible for constituting a Trial Chamber which is responsible for subsequent proceedings.

<sup>73</sup> *Rome Statute*, *ibid.* at Part VI – The Trial (Articles 62 to 76). Article 64(8)(a) provides for the entry of a plea of guilty or not guilty.

<sup>74</sup> *Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties*, ICC-01/05-01/08-55, Pre-Trial Chamber III, *Bemba*, 31 July 2008, paras. 5, 8-11.

<sup>75</sup> *Rome Statute*, *supra* note 1 at Article 60 (Initial proceedings before the Court); *ICC RPE*, *supra* note 15 at Rule 121 (Proceedings before the confirmation hearing), which requires in subsection (1) that the Pre-Trial Chamber set the date on which it intends to hold a hearing to confirm the charges; in subsection (2) requires that the Pre-Trial Chamber ensure that disclosure takes place under satisfactory conditions; and in subsection (3) requires that the Prosecutor provide no later than thirty days before the hearing “a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.” See also Gauthier de Beco, “The Confirmation of Charges before the International Criminal Court: Evaluation and First Application” (2007) 7 *International Criminal Law Review* 469 at 471.

<sup>76</sup> *Rome Statute*, *supra* note 1 at Article 60(3).

the Pre-Trial Chamber at the initial appearance,<sup>77</sup> and the charges must be filed at least 30 days prior to that hearing.<sup>78</sup> In *Lubanga*, the Prosecution served the charges five months after the initial appearance. Katanga waited a little over three months. Bemba waited three months, although seven months after those charges were delivered, the Prosecution was required to change the legal basis for the charges.<sup>79</sup>

In the case of Bahr Idriss Abu Garda, who appeared in response to a summons on 18 May 2009, the confirmation of charges hearing was held 19 – 29 October 2009.<sup>80</sup> Therefore the Prosecutor had four months (until 19 September 2009) within which to disclose the charges and the evidence supporting the charges.

The *Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY)* and the *Rome Statute* provisions on charging are quite similar.<sup>81</sup> There is also an abundance of *ad hoc* Tribunal jurisprudence on charging practices.<sup>82</sup> Yet, the ICC has become an area of unpredictable and contradictory jurisprudence when it comes to challenging the form of the charges.

In *Lubanga*, the decision on a motion challenging the failure to allege with specificity the mode of participation was included as part of the decision on the confirmation of charges.<sup>83</sup> Pre-Trial Chamber I ruled that “the Prosecution is under no obligation to articulate in the Document Containing the Charges its legal

<sup>77</sup> *Ibid.* at Article 61(3)(a) and *ICC RPE*, *supra* note 15, Rule 121(3).

<sup>78</sup> *ICC RPE*, *supra* note 15, Rule 121(3).

<sup>79</sup> The initial appearance in *Bemba* was held on 4 July 2008. The original charges were filed on 1 October 2008. *Document Containing the Charges and List of Evidence*, ICC-01/05-01/08-129. The confirmation proceedings were later adjourned to allow the Prosecution to amend the charges. *Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute*, ICC-01/05-01/08-388 (3 March 2009). Amended charges were filed by the Prosecution on 30 March 2009. See *Amended Document containing the charges filed on 30 March 2009*, ICC-01/05-01/08-395-Anx3.

<sup>80</sup> *The Prosecutor v. Bahr Idriss Abu Garda*, Transcript of initial appearance, ICC-02/05-02/09-T-4, at 8-9 (18 May 2009).

<sup>81</sup> *Rome Statute*, *supra* note 1. Article 67(1)(a) stipulates that an accused person is entitled “to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.” Under Article 21(4)(a) of the *ICTY Statute*, the accused is entitled “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.” In other areas, such similarity has been cause for reliance upon ICTY jurisprudence. See e.g., Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433, Appeal Chamber, *Lubanga* (11 July 2008) at para. 78: “Given that the wording of Rule 77 of the *Rules of Procedure and Evidence* is based on the wording of Rule 66 (B) of the *Rules of Procedure and Evidence of the ICTY*, it is useful to consider the relevant jurisprudence of the ICTY and the ICTR on the corresponding provisions in the ICTY and ICTR *Rules of Procedure and Evidence*. This jurisprudence confirms that the term “material to the preparation of the Defence” must be interpreted broadly.”

<sup>82</sup> Helen B. Klann, “Vagueness of Indictment: Rules to safeguard the rights of the accused” in Emmanuel Decaux, Adama Dieng & Malick Sow, eds., *From Human Rights to International Law/ Des droits de l’homme au droit international pénal*, (Dordrecht, the Netherlands: Martinus Nijhoff Publishers, 2007) at 109.

<sup>83</sup> *Decision on the confirmation of charges*, ICC-01/04-01/06-803, *Lubanga*, Pre-Trial Chamber I, (29 January 2007) at para. 146-153.

understanding of the various modes of liability and the alleged crimes.”<sup>84</sup> Details of the charges are to be divined from the charging document along with the evidence in the list of exhibits to be relied upon at the confirmation hearing.<sup>85</sup> The Lubanga Pre-Trial Chamber seemed to indicate it did not consider itself to have the power to require greater specificity from the Prosecutor.<sup>86</sup> These rulings effectively jettisoned the law on indictments developed at the *ad hoc* Tribunals.<sup>87</sup>

In *Katanga and Ngudjolo*, the Pre-Trial Chamber granted two Defence requests to strike language from the charges.<sup>88</sup> The catch-all phrase “but are not limited to” was struck because it lacked a factual basis in the evidence, and surplus language was also struck, consisting of statements taken from a contested interview of Mr. Katanga.<sup>89</sup> The Pre-Trial Chamber ordered that the language be removed because it referred only to evidence which the Defence adamantly denied and did not refer to material facts or their legal characterization.<sup>90</sup>

The Katanga Pre-Trial Chamber issued its decision on the challenges to the form of the indictment shortly before the start of the hearing on the confirmation of charges.<sup>91</sup> It announced that “in the event that the charges are confirmed, nothing in the *Statute* and the Rules prevents the filing in the pre-trial proceedings before the Trial Chamber of an amended Charging Document in which the underlined facts and their legal characterisation are adjusted in light of the Pre-Trial Chamber’s decision confirming the charges.”<sup>92</sup> However, six months earlier, Trial Chamber I had held the opposite when it ruled that “any application to amend the charges must be made to the Pre-Trial Chamber.”<sup>93</sup>

In *Bemba*, Pre-Trial Chamber III issued a Request for Clarification on Document Containing the Charges,<sup>94</sup> seeking clarification as to whether the conflict underlying the charges was international or non-international. Then, following the hearing on the confirmation of charges, Pre-Trial Chamber III issued a Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the *Rome Statute*,<sup>95</sup> which held that each mode of responsibility constituted a separate crime, and that defendants

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<sup>84</sup> *Ibid.* at para. 151.

<sup>85</sup> *Ibid.* at para. 150.

<sup>86</sup> See *Decision on confirmation of charges*, in *Lubanga* at para. 150-53. Rather than requiring greater specificity in the pleading, Pre-Trial Chamber I stated that it “can only regret that the Prosecution did not see fit to plead with greater specificity the context in which the crimes” occurred.

<sup>87</sup> Helen B. Klann, *supra* note 82 at 109-124.

<sup>88</sup> *Decision on the Three Defences’ Requests Regarding the Prosecution’s Amended Charging Document*, ICC-01/04-01/07-648, *Katanga and Ngudjolo*, Pre-Trial Chamber I (25 June 2008).

<sup>89</sup> *Ibid.* at para. 34-5.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.* at para. 12.

<sup>93</sup> *Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted*, ICC-01/04-01/06-1084, *Lubanga*, Trial Chamber I (13 December 2007) at para. 40.

<sup>94</sup> ICC-01/05-01/08-207 (4 November 2008).

<sup>95</sup> ICC-01/05-01/08-388 (3 March 2009).

were in fairness entitled to notice of the crime with which they are charged.<sup>96</sup> The Pre-Trial Chamber gave the Prosecution an opportunity to amend the charges to conform with the evidence and requested briefings on the new charges and command responsibility. The amended charges now include allegations of command responsibility.<sup>97</sup>

## B. Disclosure of Evidence

### 1. EVIDENCE SUPPORTING ARREST WARRANTS

There are three discrete sets of disclosure which must be completed before the Pre-Trial Chamber: (1) the evidence relied upon in support of the arrest warrant; (2) the evidence relied upon in support of the charges, which must be disclosed at least 30 days before the hearing on confirmation of charges;<sup>98</sup> and (3) exculpatory evidence. In addition, Pre-Trial Chamber II has also required that all materials provided to the Defence by the Prosecution should be communicated to the Registry for inclusion in the case dossier.<sup>99</sup>

Disclosure of the evidence supporting the arrest warrant is necessary if an accused person is to be able to seek provisional release under Article 60(2), which provides that unless the conditions for an arrest warrant set out in Article 58(1) continue to be met, the Pre-Trial Chamber shall release the person named in the warrant, with or without conditions. Article 58(1) requires, *inter alia*, that “[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.”<sup>100</sup>

There are currently no precise directions in the *Statute* or *Rules* governing the disclosure of this evidence. In *Bemba*, the evidence relied upon in granting the arrest warrant was only identified to the Defence ten months after the warrant was executed. When the Defence objected to the lack of disclosure in their motion for provisional release and on appeal, the Appeals Chamber adopted the following findings of law:

1. In order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case. Ideally, the arrested person should have all such information at the time of his or her initial appearance before the Court.

<sup>96</sup> *Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute*, ICC-01/05-01/08-388, *Bemba* (3 March 2009) at para. 26-28.

<sup>97</sup> ICC-01/05-01/08-395 (30 March 2009).

<sup>98</sup> *ICC RPE*, *supra* note 15 at Rule 121(3).

<sup>99</sup> *Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties*, ICC-01/05-01/08-55, *Bemba*, Pre-Trial Chamber II (31 July 2008) at para. 48.

<sup>100</sup> *Rome Statute*, *supra* note 1. Article 58(1) also requires that the arrest appears necessary to ensure attendance at trial, to prevent obstruction of investigations or court proceedings, or to incapacitate the person in order to prevent further commission of crimes.

2. To allow this to take place, the Appeals Chamber considers that the Prosecutor should have this in mind when submitting an application for a warrant of arrest under Article 58 of the Statute and should, as soon as possible, and preferably at that time, alert the Pre-Trial Chamber as to any redactions that he considers might be necessary.

3. The nature and timing of such disclosure must take into account the context in which the Court operates. The right to disclosure in these circumstances must be assessed by reference to the need, *inter alia*, to ensure that victims and witnesses are appropriately protected (see Article 68 (1) of the *Statute* and Rule 81 of the Rules).<sup>101</sup>

## 2. EXCULPATORY EVIDENCE

The Pre-Trial Chamber's supervisory role in relation to the disclosure of exculpatory evidence is illustrated by the litigation which arose in connection with the Prosecutor's use of confidentiality agreements under Article 54(3)(e). Article 54(3)(e) allows the Prosecutor to "[a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents." In the Lubanga case, he used these agreements to gain wholesale access to evidence which was not intended to generate new evidence, but was expected to be used as evidence at trial, and which in some instances contained exculpatory evidence.<sup>102</sup> Rule 67(2) requires disclosure of exculpatory evidence, and provides for judicial review "in case of doubt" as to whether there should be disclosure.

Although most prominently played out in the Trial Chamber, the struggle between the Prosecutor and the Pre-Trial Chamber formed the backdrop leading to the imposition of a indefinite stay of the trial proceedings in *Lubanga*.<sup>103</sup> In his appeal of the indefinite stay, the Prosecutor submitted that he had already furnished the Chamber with "adequate information" and that the Chamber should "refrain from interfering with the manner in which the Prosecution is discharging its disclosure duties,"<sup>104</sup> and criticized the Trial Chamber "for declining an offer to 'confer' with an

<sup>101</sup> *Decision on application for Interim Release*, ICC-01/05-01/08-323, *Bemba* (16 December 2008). A judgement on the appeal of Bemba against the decision of Pre-Trial Chamber III.

<sup>102</sup> *Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008*, ICC-01/04-01/06-1401, *Lubanga*, Trial Chamber I (13 June 2008) at para. 12.

<sup>103</sup> *Ibid.* This issue had already arisen in the Pre-Trial Chamber, and not only in *Lubanga*. See, e.g., *Decision on the Prosecutor's Application that the Pre-Trial Chamber disregard as irrelevant the Submission filed by the Registry on 5 December 2005*, ICC-02/04-01/05-147, *Situation in Uganda*, Pre-Trial Chamber II (8 March 2006). The Chamber held, "Article 54, paragraph 3(f) of the Statute cannot be invoked by the Prosecutor to preclude information from coming before a Chamber. This provision does not grant the Prosecutor an absolute right to confidentiality, especially towards the judges or the Chambers, but simply an entitlement 'to ensure the confidentiality of information', which the Chamber itself may also ensure."

<sup>104</sup> *Decision on consequences of non-disclosure*, ICC-01/04-01/06, *Lubanga* (13 June 2006) at para. 14.



information-provider.”<sup>105</sup>

Scheffer envisioned such problems would arise, noting that the “regular eruption” of “miscarriages of justice” arising from the non-disclosure of exculpatory evidence in national systems “suggests that it is an issue that should remain in the forefront of serious examination by the ICC judges, particularly in the Court’s early years of litigation.”<sup>106</sup> His theory that “[t]he front line is the Pre-Trial Chamber” does not yet hold true at the ICC.<sup>107</sup> Pre-Trial Chamber I confirmed the charges in *Lubanga*, leaving it to the Trial Chamber to sort out the Prosecutor’s misuse of the confidentiality agreements. In future, the Pre-Trial Chambers should more closely examine what consequences might apply if exculpatory evidence is being withheld prior to the confirmation of charges.

### 3. SUBSTANTIAL EVIDENCE TO SUPPORT THE CHARGES

The disclosure of evidence to be relied upon at the confirmation of charges hearing involves a complex system where each item disclosed or inspected is placed into the case dossier, such that the Pre-Trial Chamber may conduct its own analysis of all the evidence.<sup>108</sup> The decision setting out the disclosure process has been described as reflecting “the instincts of an activist judge willing to dig deep into the investigative procedures and direct the parties as to how the evidence will be managed in the future rather than await their performance and judge accordingly.”<sup>109</sup>

A Judge on the Yugoslav Tribunal, who was also a former Defence Counsel coming from a continental legal system, noted that

[a]lthough disclosure is an inherent aspect of common-law modelled criminal procedures, it has lost a bit of its character in the ICC. The communication of all the disclosed material and information with the Trial Chamber alters the character of the disclosure. It has approached in its effects the creation of a dossier.<sup>110</sup>

However, this dossier is different than one might encounter in a continental legal system. Under the decisions of the Pre-Trial Chambers, the Prosecutor is

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<sup>105</sup> Prosecution’s Application for Leave to Appeal *Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the Application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008*, ICC-01/04-01/06-1407 *Lubanga*, Trial Chamber I (23 June 2008) at para. 15.

<sup>106</sup> Scheffer, *supra* note 59 at 151, 152.

<sup>107</sup> *Ibid.*

<sup>108</sup> See *Decision on the final system of disclosure and the establishment of a timetable*, ICC-01/04-01/06-102, *Lubanga*, Pre-Trial Chamber I (15 May 2006) at 5-6.

<sup>109</sup> Scheffer, *supra* note 59 at 159, referring to *Decision on the final system of disclosure and the establishment of a timetable*, ICC-01/04-01/06-102, *Lubanga*, Pre-Trial Chamber I (15 May 2006).

<sup>110</sup> Alphons Orie, “Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC” in Antonio Cassese, *supra* note 38 at 1484.

strategically allowed to withhold relevant evidence which he intends to use at trial, so long as he does not need it to meet the “substantial grounds” threshold necessary to confirm the charges.<sup>111</sup> This is similar to what occurs in some common law systems, except that the “substantial grounds” threshold imposes a heavier burden than the “probable cause” or “*prima facie* evidence” standard.<sup>112</sup> Evidence is strategically withheld in order to protect witnesses or otherwise gain an advantage at trial.

### C. Participation of Victims

The Court must notify “victims or their legal representatives who have already participated in the proceedings or, as far as possible, those who have communicated with the Court in respect of the case in question,” of the decision to hold a confirmation of charges hearing.<sup>113</sup> In order to participate in such hearings, victims must submit a written application and receive authorisation from the relevant Chamber.<sup>114</sup>

Pre-Trial Chamber I has limited the appointments of *ad hoc* counsel to the investigative phase so that adversarial positions may be taken in response to applications from individuals wishing to be recognised as victims in order to participate in the proceedings. Pre-Trial Chamber II has appointed *ad hoc* Counsel to represent the Defence in the absence of the persons sought by the Court.<sup>115</sup> Appeals by *ad hoc* Counsel raising conflict of interest arguments are currently pending before the Court.<sup>116</sup> Assignment of *ad hoc* Counsel appears to be required whenever a Pre-Trial Chamber decides to address the question of admissibility on its own initiative.<sup>117</sup>

Rule 91 governs the participation of victims in the proceedings. It provides that legal representatives of victims who have been granted standing to participate are “entitled” to attend and participate in the proceedings, including hearings, “unless the Chamber concerned is of the view that the representative’s intervention should be

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<sup>111</sup> *Rome Statute*, *supra* note 1 at Article 61(7). Additionally, Article 67(2) stipulates that exculpatory evidence must be disclosed as soon as practicable. See also Article 64(3)(c), “Functions and powers of the Trial Chamber”, and *ICC RPE*, *supra* note 15 at Rule 84 on “Disclosure and additional evidence for trial”. See also Kai Ambos and Dennis Miller, “Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective” (2007) 7 *Int’l Crim. L. R.* 335 at 343.

<sup>112</sup> Gauthier de Beco, *supra* note 75 at 475-6.

<sup>113</sup> *ICC RPE*, *supra* note 15 at Rule 92(3).

<sup>114</sup> *Decision on the Applications for Participation in the Proceedings of a /0001/06, a/0002/06 and a/0003/06*, ICC-01/04-01/06, *Lubanga* and Situation in the Democratic Republic of the Congo (28 July 2006); *Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans Lubanga*, ICC-01/04-01/06-601, *Lubanga* (20 October 2006) (available only in French).

<sup>115</sup> See *Decision on the admissibility of the case under Article 19(1) of the Statute*, ICC-02/04-01/05-377, *Kony et als.* (10 March 2009) at para. 32.

<sup>116</sup> Defence Appeal against *Decision on the admissibility of the case under Article 19 (1) of the Statute* ICC-02/04-01/05-379, *Kony et als.*, (16 March 2009).

<sup>117</sup> Judgement on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I in *Decision on Prosecutor’s application for Warrants of Arrest, Article 58*, ICC-01/04-169-US-Exp, *Situation in the Democratic Republic of Congo* (13 July 2006, reclassified as public on 23 September 2008).

confined to written observations or submissions.”

Under Rule 93, a Chamber is authorised to “seek the views of victims or their legal representatives [participating in proceedings] on any issue, including *inter alia*”,

Rule 125 : decisions to hold a hearing on the confirmation of charges in the absence of the person concerned;

Rule 128 : amendment of the charges;

Rule 136 : joint and separate trials;

Rule 139 : decision on admission of guilt; and

Rule 191 : assurances provided by the Court for witnesses and experts under Article 93(2).

In addition, Article 19(3) provides that victims may submit observations on questions of jurisdiction and admissibility of a case; Article 13(2) provides that victims shall be allowed to consult the court record. This has been held to include non-public documents.<sup>118</sup>

#### **D. The Confirmation of Charges Hearing**

To date there have been three hearings which have been held to consider the confirmation of charges. Two were held before Pre-Trial Chamber I (Lubanga and Katanga), and the third was held before Pre-Trial Chamber III (Bemba).

##### **1. PRE-TRIAL CHAMBER I**

In *Lubanga*, a Single Judge of Pre-Trial Chamber I issued a decision setting out the disclosure processes for preparing for the confirmation hearing.<sup>119</sup> Dates were set for disclosure of the evidence upon which the parties intended to rely at the hearing. The case dossier was limited to the evidence selected by the parties:

In the opinion of the single judge, it is not the role of the Pre-Trial Chamber to find the truth concerning the guilt or innocence of Thomas Lubanga Dyilo, but to determine whether sufficient evidence exists to establish substantial grounds to believe that he is criminally liable for the crimes alleged by the Prosecution. The single judge considers that it would be contrary to the role of the Pre-Trial Chamber to file in the record of the case and present at the confirmation hearing potentially exculpatory and

<sup>118</sup> *Decision on the Applications for Participation in the Proceedings of VPRS I – 6*, ICC-01/04-101, *Situation in the Democratic Republic of Congo* (17 January 2006) at para. 76.

<sup>119</sup> *Decision On The Final System Of Disclosure And The Establishment Of A Timetable*, ICC-01/04-01/06-102, *Lubanga*, Pre-Trial Chamber I (16 May 2006).

other materials disclosed by the Prosecution before the hearing, if neither party intends to rely on those materials at that hearing.<sup>120</sup>

At the hearing, the evidence included on the Prosecution and Defence lists of evidence was automatically “admitted into evidence for the purpose of the confirmation hearing” unless the Pre-Trial Chamber expressly ruled the evidence inadmissible “upon a challenge by any of the participants at the hearing.”<sup>121</sup> It defined the Prosecution’s evidentiary burden as follows:

[T]he Prosecution [...] must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations. Furthermore, the ‘substantial grounds to believe’ standard must enable all the evidence admitted for the purpose of the confirmation hearing to be assessed as a whole. After an exacting scrutiny of all the evidence, the Chamber will determine whether it is thoroughly satisfied that the Prosecutor’s allegations are sufficiently strong to commit [the case] to trial.<sup>122</sup>

Responsive post-hearing briefs were allowed in both *Lubanga* and *Katanga*.<sup>123</sup>

#### a. *Lubanga*

The first confirmation of charges hearing to be held was in *Lubanga*. The hearing spanned 13 days over a three week period.<sup>124</sup> They featured two Counsel representing groups of victims, and one Defence Counsel. Three full days were spent on opening statements and closing arguments. The Prosecution’s presentation of documentary and video evidence took two days, and was followed by a Prosecution witness who was examined and cross-examined over three days of testimony. One question was put to the witness by the judge on behalf of a victims’ representative. This was followed by four days of procedural matters and Defence arguments. When the Defence objected to a racial label used by the Prosecution, the Pre-Trial Chamber requested and was provided with additional evidence on the issue from the

<sup>120</sup> *Ibid.* at para. 56.

<sup>121</sup> *Decision on the schedule and conduct of the confirmation hearing*, ICC-01/04-01/06-678, *Lubanga*, Pre-Trial Chamber I (7 November 2006) at 9; *Decision on confirmation of charges*, ICC-01/04-01/06-803, *Lubanga*, Pre-Trial Chamber I (29 January 2007) at para. 40.

<sup>122</sup> *Decision on the confirmation of charges*, ICC-01/04-01/06-803, *Lubanga* (29 January 2007).

<sup>123</sup> In the *Lubanga* case, see *Decision on the schedule and conduct of the confirmation hearing*, ICC-01/04-01/06-678, *Lubanga* (7 November 2006); *Brief on Matters the Defence raised during the confirmation hearing – Legal observations*, ICC-01/04-01/06-764, *Lubanga*, (7 December 2006). In the *Katanga* case, see *Schedule of the Confirmation Hearing*, ICC-01/04-01/07-587-Anx 1, *Katanga*, Section N at 4, (13 June 2008); *Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing*, ICC-01/04-01/07-698, *Katanga* (28 July 2008).

<sup>124</sup> Hearing Transcripts, ICC-01/04-01/06-T-30 to ICC-01/04-01/06-T-47, *Lubanga* (9 to 28 November 2006).

Prosecution. The hearing ended with a full day of closing arguments by the Prosecution, victims' representatives and the Defence.

*b. Katanga and Ngudjolo*

The *Katanga and Ngudjolo* hearing was slightly shorter in the total number of hours, but it was scheduled during eleven half-days over a three week period.<sup>125</sup> The number of counsels involved was much greater. The proceedings included four teams of Counsel representing groups of victims, as well as the team of lawyers for the Prosecution and Defence Counsel for Katanga and for Ngudjolo. A total of four half-days were filled with opening statements and closing arguments by prosecution, victims representatives and both Defence teams. Two half-days were filled with procedural matters, including one day spent addressing the waiver of Katanga's right to be present at the hearing. The Prosecution presented its evidence over two half-days, the victims argued about the evidence during one half-day, and the Katanga and Ngudjolo Defence teams took one half-day each to present their arguments and evidence against confirmation.

There were no live witnesses. Prior to the hearing, a Defence Counsel suggested that confirmation of charges might be conducted in writing, with only a short hearing.<sup>126</sup> This suggestion was ignored, as the three-week-long schedule was adhered to.

2. PRE-TRIAL CHAMBER III

The approach of Pre-Trial Chamber III has been very different from that adopted by Pre-Trial Chamber I. Pre-Trial Chamber III regards its role as central to the truth seeking process. Therefore, the Chamber needs "access to the evidence exchanged between the Prosecutor and the Defence, in particular to exculpatory evidence."<sup>127</sup> Even more, Pre-Trial Chamber III includes in the case dossier all materials disclosed under RPE 77. Rule 77 governs the "Inspection of material in possession or control of the Prosecutor," and permits the Defence to inspect materials in the possession of the Prosecution which are "material to the preparation of the defence."<sup>128</sup> Therefore, under the regime imposed in Pre-Trial Chamber III, any evidence inspected by the Defence in the Prosecution archives is automatically communicated to the Chamber and becomes part of the case dossier.<sup>129</sup>

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<sup>125</sup> Hearing Transcripts, ICC-01/04-01/07-T-38 to ICC-01/04-01/07-T-50, *Katanga and Ngudjolo*, (27 June to 16 July 2008).

<sup>126</sup> Status Hearing Transcript, ICC-01-04-01-07-T-35, *Katanga*, Pre-Trial Chamber I, (10 June 2008) at 12, 22-28. Counsel for Katanga suggested that his client would be willing to conduct the proceedings in writing and that the confirmation hearing could take place in a single day.

<sup>127</sup> *Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties*, ICC-01/05-01/08-55, Pre-Trial Chamber III, *Bemba*, (31 July 2008) at para. 16-19.

<sup>128</sup> *Ibid.* at para. 49.

<sup>129</sup> *Ibid.*

a. *Bemba*

The hearing in *Bemba* involved eight counts of war crimes and crimes against humanity and it lasted four days.<sup>130</sup> Opening statements and closing arguments took less than one day. No witnesses were called by either side. The parties were required to follow a strict outline of the legal issues, with the floor passing between the parties at each issue, rather than requiring (or allowing) the Prosecution to present its full case before requiring the Defence to respond.

On the initial day of the hearing, Pre-Trial Chamber III announced for the first time that “because the hearing itself is oral, the Chamber would like to ask the parties and other participants to present their requests or motions orally. Only in exceptional circumstances and with the authorization of the Bench may the participants file written requests or motions. Upon such a request or motion, the Chamber will either discuss the matter from the Bench with the microphones cut off and immediately issue a decision, or the Chamber will deliberate the matter outside the courtroom and issue a decision at a later time.”<sup>131</sup> The Defence had announced at status conferences that it intended to rely on a post-hearing brief, so objections were made and a twenty-five page brief was permitted.<sup>132</sup> Pre-Trial Chamber III closed the hearing by assuring the parties that if they had omitted addressing any of the evidence which had been disclosed by the prosecution, they need not worry because the Chamber would be independently examining all of the evidence, exculpatory and inculpatory, in reaching its decision on whether or not to confirm charges.<sup>133</sup>

## E. Decision on the Confirmation of Charges

Following the hearing, the Pre-Trial Chamber must determine whether there is sufficient evidence to establish “substantial grounds” to believe that the person committed each of the crimes charged.<sup>134</sup> The Pre-Trial Chamber has several options: (1) it may confirm the charges, (2) deny confirmation of the charges on the basis of insufficient evidence, or (3) it may adjourn the hearing either to request the Prosecutor to consider presenting additional evidence, or to request the Prosecutor to consider amending the charges in order to conform them to the evidence.<sup>135</sup>

The decision on the confirmation of charges must be delivered by the Pre-Trial Chamber within sixty days of the conclusion of the hearing.<sup>136</sup> In *Lubanga*, the

<sup>130</sup> See Hearing Transcripts, ICC-01/05-01/08-T-9 to ICC-01/05-01/08-T-12, *Bemba*, (12 to 15 January 2009).

<sup>131</sup> Hearing Transcripts, ICC-01/05-01/08-T-9, *Bemba*, (12 January 2009) at 8.

<sup>132</sup> *Ibid.* at 10-11.

<sup>133</sup> Hearing Transcripts, ICC-01/05-01/08-T-12, *Bemba*, (15 January 2009) at 141.

<sup>134</sup> *Rome Statute*, *supra* note 1 at Article 61(7).

<sup>135</sup> *Ibid.*

<sup>136</sup> International Criminal Court Regulation 53 (entitled “Decision of the Pre-Trial Chamber following the confirmation hearing”).

decision was 157 pages long.<sup>137</sup> It has been the subject of numerous scholarly articles in law reviews<sup>138</sup> and has been criticized, *inter alia*,<sup>139</sup> for its definition of “substantial grounds to believe”<sup>140</sup> and for failing to keep in mind the summary nature of the confirmation of charges proceedings:

It can even be said that Pre-Trial Chamber I by examining the history of the war in Ituri as well as numerous official reports and witness statements, as can be seen from its Decision to confirm the charges, largely exceeded the threshold required to confirm the charges brought by the Prosecutor. As a result, it somewhat contributed to the feeling that *Thomas Lubanga Dyilo* is already guilty. Doing so might have undermined his right to the presumption of innocence protected by Article 66(1).<sup>141</sup>

In *Katanga*, the *Decision on confirmation of charges* is 213 pages long.<sup>142</sup> Unlike in *Lubanga*, articles criticizing *Katanga* have not yet been published at the time of writing. However, Judge Anita Usacka appended a partly dissenting twelve-page opinion to the Decision, where she wrote that she was not “thoroughly satisfied” that “the Prosecution’s allegations were sufficiently strong to establish substantial grounds to believe that the suspects were criminally responsible for the commission of rape and sexual slavery to be committed during the attack on Bogoro village, or even in the aftermath of the Bogoro attack, or to establish the suspects’ knowledge that rape and sexual slavery would be committed by the combatants in the ordinary course of events.”<sup>143</sup> She suggested that the proceedings should have been adjourned

<sup>137</sup> *Decision on the confirmation of Charges*, ICC-01/04-01/06, *Lubanga* (29 January 2007); *Decision on the confirmation of charges*, ICC-01/04-01/07-717, *Katanga and Ngudjolo*, (1 October 2008).

<sup>138</sup> Gauthier de Beco, *supra* note 75; Daniel Bodansky, “International Decisions” (2007) 101 A.J.I.L. 841; Matthew Happold, “Prosecutor v. *Thomas Lubanga*, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007”, (2007) 56 I.C.L.Q. 713; Juan Ochoa, “The ICC’s Pre-Trial Chamber I confirmation of Charges Decision in the *Case of Prosecutor v. Thomas Lubanga Dyilo*: Between Application and Development of International Criminal Law”, (2008) 16 Eur.J. Crime, Crim.L. & Crim.J. 39.

<sup>139</sup> Other criticisms relate to: (1) the Pre-Trial Chamber’s interpretation of “protracted armed conflict” in relation to armed groups and (2) questions concerning the Pre-Trial Chambers analysis of whether use as a body guard is enough to qualify as participating actively in hostilities – see Juan Ochoa, *ibid.* at 44-46; (3) whether enunciated standards on co-perpetration were correctly applied – see Thomas Weigand, “Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges”, (2008) 6 J. Int’l Criminal Justice 471-487. See also Michela Miraglia, “Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in *Lubanga*”, (2008) 6 J. Int’l Criminal Justice 489-503, noting that a number of procedural aspects of the decision will further judicial interpretation to become less contentious.

<sup>140</sup> Decision on Confirmation of charges, *Lubanga*, para. 38-39; Gauthier de Beco, *supra* note 75 at 474-5 and notes 19 and 20, where he stipulates that “First, the terms ‘serious reasons to believe’ or ‘strong grounds for believing’ were not used by the European Court of Human Rights to determine the terms ‘substantial grounds to believe’. Second, these standards have been applied in a totally different context, namely in the so-called ‘death row phenomenon’ under Article 3 of the European Convention of Human Rights.”

<sup>141</sup> Gauthier de Beco, *supra* note 75 at 476.

<sup>142</sup> *Decision on the confirmation of charges*, ICC-01/04-01/07-717, *Katanga and Ngudjolo*, Pre-Trial Chamber I, (1 October 2008).

<sup>143</sup> *Ibid.* at para. 14.

to allow the Prosecutor to amend the charges.<sup>144</sup>

Bemba was ultimately charged with two counts of crimes against humanity, and three counts of war crimes.<sup>145</sup>

# 1. THE POSITION OF THE “CHARGED PERSON”

Rule 121 provides that the rights of an accused person under Article 67 apply to a charged person preparing for a confirmation of charges hearing.<sup>146</sup> However, the ICC’s legal aid system is designed to deny all but the most basic legal assistance until after charges have been confirmed.<sup>147</sup> A close examination of the *travaux préparatoire* leading to the adoption of the legal aid system shows that no one anticipated that victims participate in the proceedings before the Pre-Trial Chamber. No consideration was given to the Defence labour required to address issues relating to victims participation. The Registry has just issued a report to the Assembly of States Parties to the Rome Statute, which states:

In the cases of Lubanga and Katanga et al., the total number of filings in each case is 1,431 documents (of which 415 are public) and 683 (of which 233 are public) respectively. Such a rate averages some 2.5 filings per day and, when submitted by parties or participants other than the Defence, all must be considered carefully by the Defence itself. These documents are in addition to the countless ones disclosed by the Prosecutor to the Defence and which are not in the case file.<sup>148</sup>

The prosecution has dozens of attorneys sharing the workload leading up to a confirmation hearing,<sup>149</sup> while generally a single Defence Counsel (albeit with a legal

<sup>144</sup> *Ibid.* at para. 36.

<sup>145</sup> *Decision on the confirmation of charges*, ICC-01/05-01/08, Bemba, (15 June 2009).

<sup>146</sup> *Decision on the final system of disclosure and the establishment of a timetable*, ICC-01/04-01/06-102, Lubanga, (15 May 2005) at para. 96-7. The *Statute* grants the right to challenge evidence presented by the Prosecution at the confirmation hearing and adequate time and facilities to prepare for such a hearing.

<sup>147</sup> See *Report to the ASP on options for ensuring adequate Defence counsel for accused persons*, ICC-ASP/3/16. See also *Report on the operation of the Court’s legal aid system and proposals for its amendment*, ICC-ASP/6/4, Annex IV at 16. The adversarial relationship with the Registry who administers legal aid, and the drain on Defence resources resulting from the need to engage in repeated legal aid appeals are described in Jean Flamme, “L’affaire Lubanga au stade préliminaire devant la Cour Pénale Internationale: une primeur historique, également pour les droits de l’homme et les droits de la défense” (2010) in the present AIAD volume, RQDI at paras. 44-55. See also *Demande d’intervention sur « Demande de ressources additionnelles en vertu de la norme 83.3 du Règlement de la Cour » déposée devant le Greffe en date du 3 Mai 2007*, ICC-01/04-01/06-916-Anx2, Lubanga, Pre-Trial Chamber I (24 May 2007) at 12. Here the Registrar refuses to consider additional resources until the “decision on the confirmation of charges is definitive.”

<sup>148</sup> “Interim report on different legal aid mechanisms before international criminal jurisdictions”, ICC-ASP/7/12 (19 August 2008). This report by the Registry was submitted at the invitation of the Assembly of States Parties, which was seeking ways to reduce costs.

<sup>149</sup> “Proposed Programme Budget for 2007 of the International Criminal Court”, ICC-ASP/5/9, (22 August 2006) at 20. The Court’s proposed budget program for 2007 includes a diagram of the



assistant and a case manager) faces hundreds of deadlines involving complex and difficult issues. The number of motions and decisions, the shortness of filing deadlines (for example, 5 days to seek leave to appeal decisions which may be hundreds of pages long), combined with the fact that the computation of time includes weekends and holidays regardless of how short the deadline, creates a particularly difficult burden upon a single Defence Counsel. Additionally, Defence Counsel must grapple with court decisions in French or English and no translation services provided before time expires on seeking leave to appeal. The Pre-Trial Chamber in *Katanga* adopted the Registry practice of requiring designated Counsel to agree, prior to appointment as permanent counsel, that no English or French translation services will be required to assist in the review evidence and communicate with the client.<sup>150</sup>

The result of this process is that indigent detainees are consistently held for months without being notified of the charges against them or the evidence to be used against them. Mr. Katanga did not attend much of the hearing on the confirmation of his charges, waiving his right to be present and basing his decision on low morale due to not having seen his wife since he was arrested in 2005.<sup>151</sup> He has since won an appeal of a Registry decision limiting legal assistance for family visits.<sup>152</sup>

Moreover, attorneys for accused persons are not provided with adequate facilities to prepare a Defence.<sup>153</sup> As one Defence Counsel noted during his closing argument at the Katanga and Ngudjolo Confirmation of charges hearing:

It's been a rather strange, in fact sometimes awkward situation sitting here, confronted by -- we're uncertain of the numbers. We think it's either 12 or 13 of our learned colleagues in this confrontationally designed courtroom where we face one another in this way rather than the Bench to whom, of course, we should address. The numbers alone give us gravest doubts as to the essential systemic fairness of this system.<sup>154</sup>

The hearings in *Lubanga* and *Katanga* involved weeks of opening statements and closing arguments and discussions of evidence from the parties and participating victims, all of which generated enormous publicity but which arguably had little but symbolic value, given the non-specificity of the argumentation and the amount of evidence supporting the charges. Defence Counsel in *Katanga* raised the issue of the undue prejudice an accused person suffers as a result of the Confirmation of charges

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Prosecutor's Office showing there are divisions headed by deputy prosecutors for investigations and for prosecutions, with a service section which includes translation services.

<sup>150</sup> Status Conference transcript ICC-01/04-01/07-T11-FRA, *Katanga and Ngudjolo*, (14 December 2007) at 4-9.

<sup>151</sup> *Confirmation of Hearing Charges Transcript*, ICC-01/04-01/07-T-45, *Katanga and Ngudjolo* (9 July 2008) at 2. The Registry is currently conducting consultations on the need for legal aid to support family visits. The Assembly of States Parties has exhibited resistance to funding such visits.

<sup>152</sup> ICC-RoR217-02/08-8-Conf-Exp, *Ngudjolo* (11 March 2009, reclassified as public on 24 March 2009) (confidential decision by the Presidency).

<sup>153</sup> See Jean Flamme, *supra* note 147.

<sup>154</sup> Confirmation of charges hearing transcript, ICC-01/04-01/07, *Katanga and Ngudjolo*, (16 July 2008) at 6, para. 17-23.

hearing:

[Y]ou have made every effort, Madam President, throughout this hearing to -- to remind us and the parties that this is not a trial, nor is it a mini trial, but a procedure which has as its objective the assessment of the evidence with a view to confirming or not confirming charges. We feel that your advice, daily advice, has from time to time perhaps been lost sight of in the course of this hearing, and particularly yesterday by many of the parties, including the Prosecution. This may largely be a product, we feel and reflect, on the public nature of this hearing, but perhaps this is an issue that deserves revisiting by the States Parties. One of the problems, of course, of such a public hearing, particularly when counsel are involved, and we're all vulnerable to this, is that it generates rhetoric, and rhetoric perhaps has no place in this particular procedure. We hope something can be done to address the problem in respect of those who follow us. We refer, for example, to the procedure for grand jury presentation in the United States, or from my own experience in respect of *prima facie* hearings in the United Kingdom where there's an embargo, for example, on all publicity and very limited information is allowed to be published in respect of such a hearing. In fact, it's really reduced to merely the name of the accused and the charges upon which committal has taken place, because otherwise it is very capable of inflicting an injustice on the accused person. He's not here to be placed in a public pillory and such a system, perhaps, is not the greatest encouragement to participation by the accused person.<sup>155</sup>

### III. Critical Appraisal of Proposals for Amending Part V of the *Rome Statute*

#### A. Proposals Relating to the Investigation Phase

The political pressures on the Office of the Prosecutor are substantial.<sup>156</sup> It is also evident that there is a struggle between the Office of the Prosecutor and Chambers over the extent to which each controls proceedings before the Court.<sup>157</sup>

<sup>155</sup> Confirmation of charges hearing transcript, ICC-01/04-01/07-T-50, *Katanga and Ngudjolo*, (16 July 2008) at 6 -7, paras. 17-23.

<sup>156</sup> For example, newspapers around the world reported an Arab League resolution that 'criticized the International Criminal Court's "unbalanced" prosecutor for seeking the arrest of Sudanese President Omar Bashir'. See e.g., "Arab League slams ICC prosecutor", *Washington Times* (20 July 2008) Online: *Washington Times* <<http://www.washingtontimes.com/news/2008/jul/20/world-scene-58611203/>> (accessed: 28 July 2010). See also, "Uganda's LRA Rebels Displeased With ICC Chief Prosecutor", *Voice of America*, (15 October 2007), Online: *Voice of America* <<http://www1.voanews.com/english/news/a-13-2007-10-15-voa2.html>> (accessed: 28 July 2010). VOA reported that a legal advisor for the Lord's Resistance Army (LRA), whose leaders are currently the subject of ICC arrest warrants arising out of Uganda, said: "We do respect the ICC, but we don't respect Moreno-Ocampo. We don't want these things to be distinguished. Moreno-Ocampo has become personal and the LRA is determined to also become personal because Moreno-Ocampo has left his job and he has now become a witch hunter, a prosecutor, and investigator and doing all the things that are actually against the LRA."

<sup>157</sup> Happold, *supra* note 138, discussing the prosecution's decision to appeal the Trial Chamber's *proprio motu* amendment of the charges in the Lubanga case. The struggle between the Judges and the

Over-reliance on confidentiality agreements and a failure to demonstrate confidence and trust in the judges of the Court by excluding them from the confidentiality agreements has led to mounting criticisms of Prosecutor Luis Moreno-Ocampo's running of the office. However, each Prosecutor serves one nine-year non-renewable term, and this Prosecutor's term will not end until June 2012.<sup>158</sup> He may only be removed from office if he is found to have "committed serious misconduct or a serious breach of his or her duties" or is unable to exercise his functions required by the Statute.<sup>159</sup>

Calls for a different investigative model continue to be made.<sup>160</sup> On one extreme is a proposal by Professor William T. Pizzi, who argues that to avoid "daunting logistical problems, [...] [t]here should be a single, neutral investigation that is as full and complete as possible, and the investigators should be obligated to pursue all relevant evidence, whether it favours the prosecution or the defence."<sup>161</sup> Pizzi envisages that some witnesses would be called to testify, but the number would be kept to a minimum.<sup>162</sup>

International criminal law barrister Gillian Higgins has made a similar proposal that includes more adversarial safeguards. She proposes the

establishment of an independent commission to assist in the investigation process [...] The commission would be staffed by independent investigators experienced in conducting complex investigations. Acting in the interests of the whole community, the commission would gather evidence for both the prosecution and the Defence in respect of the alleged crimes and subsequently present its dossier to the trial chamber. A copy of the dossier would also be disclosed to the prosecution and the Defence, forming the main evidential basis of the trial. [...] Admissibility of the contents of the dossier would then be determined by the chamber after hearing submissions from the parties. The Defence and the prosecution would have the right to request the commission to conduct particular witness interviews or seek to obtain specific material. They would also

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Prosecutor has become more evident since the Lubanga case has been transferred to the Trial Chamber. See also *Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused'*, ICC-01/04-01/06-1417, *Lubanga*, Trial Chamber I (2 July 2008).

<sup>158</sup> *Rome Statute*, *supra* note 1 at Article 42(4). On 21 April 2003, the Assembly of States Parties to the *Rome Statute of the International Criminal Court*, meeting in its second resumed first session, unanimously elected Mr. Luis Moreno-Ocampo of Argentina as first Prosecutor of the Court. He was sworn in on 16 June 2003, and therefore his term will expire in 2012.

<sup>159</sup> *Rome Statute*, *supra* note 1 at Article 46.

<sup>160</sup> Gillian Higgins, "Fair and Expeditious Pre-trial Proceedings: The Future of International Criminal Trials" (2007) 5 J. Int'l Criminal Justice 394 at 396; Jerome de Hemptinne, "The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?" (2007) 5 J. Int'l Criminal Justice 402; Scheffer, *supra* note 59. See also William T. Pizzi, "Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals" (2006) 4:1 International Commentary on Evidence.

<sup>161</sup> Pizzi, *ibid.* at 3.

<sup>162</sup> *Ibid.* at 4.

retain the right to conduct their own investigations and seek the admission of such evidence at trial.<sup>163</sup>

A slightly different proposal is made by Jerome de Hemptinne, who suggests creating a third independent chamber, “a genuine investigating chamber, with the authority to direct investigations.”<sup>164</sup> The third chamber would be composed of different judges than those in the Pre-Trial and Trial Chambers, and would have the power to certify the investigation of case files which would assist the trial judges in selecting which witnesses to hear and in setting limits on the length of trials.<sup>165</sup>

David Scheffer suggests a more limited mandate for an independent investigatory commission. He proposes a commission which would

investigate any referred situation or *proprio motu* application with neutrality, objectivity, and unmatched expertise. [...] but once the atrocity crime situation is confirmed through the work of such an investigatory commission, the ICC Prosecutor would narrow the search for evidence to individual suspects.<sup>166</sup>

Scheffer’s proposal to maintain an executive-style Prosecutor while relying on a commission to determine if a full investigation should be opened would only solve the problems in connection with the selection of Situations. It would not ensure that referring governments were fully investigated along with their opponents, and it would not avoid criticisms arising from the selection of a particular case to prosecute. To the extent it would provide cover for the Prosecutor, it would do so only by creating a less efficient bureaucracy which might also be more difficult to reform.

Whether a neutral commission could level the field between the prosecution and the Defence would depend on how closely together such a commission and The Prosecution would collaborate. The Defence must be able to conduct independent investigations, confront witnesses, and challenge individual pieces of evidence if the judgements of the Court are to be worthy of confidence. Even a Commission may have difficulties remaining impartial when investigating atrocities. If the Defence is guaranteed the right to conduct an independent investigation, as set out in the Higgins proposal, then the Prosecutor would also have that ability. The result might be even more cumbersome, with three investigations being undertaken, rather than only two.

When one considers the size to which the Court’s current bureaucracy has already swollen<sup>167</sup> and when global economies are suffering,<sup>168</sup> the creation of an

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<sup>163</sup> Higgins, *supra* note 160 at 396.

<sup>164</sup> De Hemptinne, *supra* note 160 at 415-17.

<sup>165</sup> *Ibid.* at 406.

<sup>166</sup> Scheffer, *supra* note 59 at 154.

<sup>167</sup> According to the ICC website, as of January 2009, 587 people work for the ICC, coming from more than 85 states.

additional level of bureaucracy seems unlikely. A new Prosecutor will be selected in 2011, and take office in 2012. Presumably the Office of the Prosecutor will undergo a process of reform at that time. The experiences of several Prosecutors may be necessary before the need for specific reforms becomes evident.

This is especially true given the steady progress being made in the investigation of various Situations around the world, many of which involve self-referrals.

## **B. Proposals Relating to the Charging Process**

### **1. DELAY**

In contrast with the investigative process, the process of charging a person seems unnecessarily long and encourages unfair and unnecessary pre-trial publicity. Certain accused, such as Bahr Idriss Abu Garda, have enjoyed an opportunity to appear voluntarily. Abu Garda is on provisional release pending the confirmation hearing. This is particularly significant because he now must wait five months to see what charges are proposed, and if everything goes smoothly, only a further thirty days until a hearing on the charges and then sixty days for a written decision on confirmation. Thus with no additional delays, it will take eight months for charging to be completed.

Those accused who await charging in detention are not so lucky. It takes an average of four months to obtain notice of the proposed charges, and much longer for the hearing on confirmation of those proposed charges. It took more than ten months to confirm the charges in *Lubanga*.<sup>169</sup> In *Katanga*, it took an entire year.<sup>170</sup> In *Bemba*, it took ten months for the Pre-Trial Chamber to decide the charges needed amending.<sup>171</sup>

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<sup>168</sup> Burke-White, *supra* note 44 at 53, 66. See section entitled “Reality of Limited Resources” which points out that the Assembly of States Parties has refused to fund the budgets requested by the Court resulting in cutbacks in programs and staffing. The relatively small budget of the Court imposes “an absolute ceiling on the activities that can be undertaken by each of the Court’s key units and restrict the strategies that the ICC can pursue to meet its goals. No institution with a €66.8 million annual budget can possibly provide global accountability.”

<sup>169</sup> Gauthier de Beco, *supra* note 75 at 471. The author calculates the pre-trial detention period in *Lubanga* as 10 months and 12 days, from 17 March 2006 (date of transfer to The Hague) until 29 January 2007 (date of decision confirming charges).

<sup>170</sup> Katanga was brought to The Hague on 18 October 2007. His co-accused, Mathieu Ngudjolo Chui made his initial appearance over four months later, on 7 February 2008. The decision to join the two cases on 10 March 2008 undoubtedly contributed to the delay in confirming their charges. See *Decision on the joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-02/07-48, Pre-Trial Chamber I (10 March 2008).

<sup>171</sup> *Decision Adjourning the Hearing* pursuant to Article 61(7)(c)(ii) of the *Rome Statute*, ICC-01/05-01/08-388, *Bemba*, Pre-Trial Chamber III (4 March 2009). Bemba was arrested by Belgian authorities on an ICC warrant on 24 May 2008. His initial appearance before Pre-Trial Chamber III was on 4 July 2008.

## 2. DISCLOSURE

Although the Appeals Chamber has ruled that the evidence supporting an arrest warrant should be disclosed promptly, it remains to be seen whether the Prosecutor will provide more prompt disclosure of materials supporting arrest warrant applications. It is the Pre-Trial Chamber which must ensure that this happens. Unless Pre-Trial Chambers make such disclosure a priority, detained persons will be denied their right to challenge their arrest and detention.

At the International Criminal Tribunal for the former Yugoslavia (ICTY), the Prosecution discloses the evidence which supports the application for the indictment (the charging document), redacted to protect the identities of witnesses, to Defence Counsel in hard copy and on CD, either at the initial appearance or as soon as permanent Counsel is identified. This system works smoothly, even in cases involving a massive quantity of documents. The same practice should govern evidence relied on by the Prosecutor in applications for arrest warrants at the ICC.

Prior to the *Rome Statute*, all international criminal tribunals had relied upon *ex parte* proceedings to confirm whether or not charges should be brought against any particular individual.<sup>172</sup> Judge Jorda, who presided over the Lubanga confirmation hearing, recently wrote that the confirmation hearing is “a significant safeguard” for persons who are the subject of an arrest warrant or summons to appear before the International Criminal Court.<sup>173</sup> He goes on:

It enables the Pre-Trial Chamber to determine, with full knowledge and on the basis of a maximum of available information, whether each charge is supported with sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged....It is important that the procedural requirements enabling the Pre-Trial Chamber to exercise judicial oversight do not contribute to delaying the proceedings, thus making trials longer. The pre-trial phase aims to contribute to good trial preparation and thereby to an efficient trial. Taken as a whole, it aims to safeguard the right of the accused, in full equality, to be tried without

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<sup>172</sup> In the Nuremberg Tribunal, Article 14 of the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, and the *Charter of the International Military Tribunal*, 82 U.N.T.S. 279 (8 August 1945) stipulated that each signatory would appoint a Chief Prosecutor to a committee which would investigate and approve indictments by majority vote; In the Tokyo Tribunal Article 8 of the *Charter of the International Military Tribunal for the Trial of the Major War Criminals in the Far East* (19 January 1946) stipulated that the Chief of Counsel designated by the Supreme Commander for the Allied Powers was responsible for the investigation and prosecution of charges); At the International Criminal Tribunal for Rwanda (“ICTR”), the *Rules of Procedure and Evidence* includes Rule 47 which stipulates that a “designated judge” approves an indictment in *ex parte* procedure; At the Special Court for Sierra Leone, *Rules of Procedure and Evidence* includes the same Rule 47 as at the ICTR. Article 61 of the *Rome Statute* broke with this tradition by providing for confirmation of charges to take place in the context of adversarial proceedings.

<sup>173</sup> Claude Jorda and Marianne Saracco, “The *Raisons d’être* of the Pre-Trial Chamber of the International Criminal Court”, in Emmanuel Decaux, Adama Dieng & Malick Sow (eds.), “*From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laity Kama*,” (Leiden, the Netherlands: Martinus Nijhoff Publishers, 2007) 420 at 430.

undue delay.<sup>174</sup>

Ambos and Miller note that: ‘The confirmation hearing pursues two *objectives* in particular: On the one hand, it operates as a *filter* and thus ensures that only the really important cases go to trial, and therefore protects the suspect against improper or unsubstantiated charges. On the other hand, it serves to avoid time-consuming discussions about disclosure of evidence in the trial phase.’<sup>175</sup>

Whether the objectives identified by Judge Jorda, and Ambos and Miller actually are achieved in a satisfactory manner is questionable.

Even at the ICTY, the need for an adversarial confirmation process is evident. The case of Agim Murtezi, who was one of four defendants charged in a nine-count indictment relating to events which took place in a make-shift prisoner of war camp in Kosovo, is illustrative.<sup>176</sup> The indictment against Murtezi had been confirmed by a reviewing Judge appointed by the President of the International Tribunal for this purpose<sup>177</sup> and Murtezi appeared before Trial Chamber I shortly after his transfer into the custody of the ICTY.

While Murtezi entered a plea of not guilty at his initial appearance, he only did so after his Counsel had drawn the attention of the Presiding Judge to apparent defects in the indictment concerning the description of Murtezi. Moreover, on the following day Murtezi’s Counsel officially alerted the Prosecution that there was a strong likelihood that Murtezi was not involved in any of the events alleged in the indictment. Counsel argued that even though Murtezi was the person named in the Indictment, the allegations comprised therein had nothing to do with him.<sup>178</sup>

Murtezi’s Counsel consented to his client being interviewed by the Prosecution as a suspect with the aim of showing that the whole Indictment was a mistake and avoiding lengthy trial procedures.<sup>179</sup> After a four-day interview conducted by the Prosecution, it emerged that the witnesses who had allegedly identified Murtezi from a photographic line-up were simply wrong and it was verifiable that Murtezi was not even remotely involved in the alleged crimes.<sup>180</sup> In addition, two of Murtezi’s co-accused consented to provide statements confirming they did not know him. As a result, and as agreed upon with the Defence, the Prosecution filed a motion to have the Indictment against Murtezi withdrawn, which

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<sup>174</sup> *Ibid.*

<sup>175</sup> Ambos and Miller, *supra* note 111 at 347-8.

<sup>176</sup> *Prosecutor v. Limaj et al.*, IT-03-66-I, Indictment, (24 July 2003).

<sup>177</sup> *ICTY Statute* Article 18; *ICTY Rules of Procedure and Evidence* Rule 28(A). Note the President designates a Trial Chamber judge to conduct the Rule 47 review.

<sup>178</sup> *Note from Defence Counsel*, Stephane Bourgon, 20 August 2008.

<sup>179</sup> *Ibid.*

<sup>180</sup> In fact, Murtezi’s Counsel later initiated a procedure which established that the evidence provided to the confirming Judge in support of the indictment actually contained no evidence positively identifying Murtezi. *Note from Defence Counsel*, Stephane Bourgon (20 August 2008).

was granted by the Trial Chamber.<sup>181</sup> One week later, on 7 March 2003, the Prosecution filed a subsequent motion to amend the original indictment, thereby removing all references therein to Murtezi.<sup>182</sup> This motion was granted on 25 March 2003.<sup>183</sup>

It is likely that without Murtezi's consent to a suspect interview, the cooperation of two of the co-accused, and the reasonableness demonstrated by the Senior Prosecution Attorney responsible for this case, Murtezi would not have been released so easily. In the absence of an adversarial confirmation process, a less positive outcome would not have been surprising considering the circumstances. By providing for an adversarial hearing prior to a decision on confirmation of charges, a person in Murtezi's situation has greater protections to ensure that charges are never confirmed in the first place.

Would Murtezi have fared better at the ICC? At the ICTY, his Defence Counsel was able to access to the evidence upon which the arrest warrant (and the indictment) had been confirmed. In contrast, at the ICC there is no guarantee that evidence will be disclosed until months after the initial appearance. Counsel would have been forced to make decisions on suspect interviews, with less available information.

As for the increased efficiency objective of the confirmation of charges process, the assembly of the dossier is of limited value given: (1) the reliance on summaries of evidence at the confirmation of charges stage of the proceedings,<sup>184</sup> (2) the fact that any redactions to evidence will have to be specifically authorised by the Trial Chamber,<sup>185</sup> and (3) the need for the Trial Chamber to oversee disclosure of the evidence the prosecution intends to use at trial but which need not be disclosed during the lengthy charging phase. Surely, resources should be focused on the proceedings which follow the confirmation of charges.

### 3. LIMITS ON THE REVIEW OF THE EVIDENCE

It is arguable that Pre-Trial Chamber III has inflated its role in post-arrest proceedings. Important though the role may be, to equate their task with a search for truth is an overstatement. Pre-Trial Chamber I has the more realistic view of its role.

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<sup>181</sup> *Prosecutor v. Fatmir Limaj; Haradin Bala and Isak Musliu*, Case No. 03-66, Order to Withdraw the Indictment Against Agim Murtezi and Order for His Immediate Release (28 February 2003).

<sup>182</sup> *Prosecutor v. Fatmir Limaj; Haradin Bala and Isak Musliu*, Case No. 03-66, Motion to Amend the Indictment (7 March 2003).

<sup>183</sup> *Prosecutor v. Fatmir Limaj; Haradin Bala and Isak Musliu*, Case No. 03-66, Decision to Grant Leave to Amend the Indictment (25 March 2003).

<sup>184</sup> *Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure*, ICC-01/04-01/07-428, *Katanga and Ngudjolo* (25 April 2008) based on *Rome Statute*, *supra* note 1 at Article 67(2), and *ICC RPE*, *supra* note 15 at Rule 77.

<sup>185</sup> *Order on Prosecution's application for redactions* pursuant to Rule 81(2) filed on 14 February 2008, ICC-01/04-01/06-1172, *Lubanga*, Trial Chamber I (15 February 2008) and *Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure*, ICC-01/04-01/07-428, *Katanga*, Pre-Trial Chamber I (21 April 2008) at para. 107-10.



Article 61(7) provides that “[t]he Pre-Trial Chamber shall, *on the basis of the hearing*, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged [emphasis added].”<sup>186</sup> For a Pre-Trial Chamber to conduct its own investigation into all materials provided to or inspected by the Defence seems unnecessary for the purposes of the confirmation of charges. The Chamber’s investigation denies the parties the ability to exercise their independent judgement regarding what evidence should be presented. It also contributes to the lengthy periods between initial appearance and the hearing on confirmation of charges, and it defeats any efficiencies which might otherwise arise from the adversarial procedures. It makes it almost impossible to effectively identify what evidence to address, when the Court is expressly focusing on a great body of evidence not being relied upon by the Prosecutor.

Scheffer urges that a new methodology is possible without amending the Statute. He suggests that judges might aggressively use status conferences

to press for the Prosecutor’s earlier delivery of the description of charges and list of evidence so that the Defence counsel has a reasonable period of time in which to review charges and the evidence list. The same would be true regarding the Defence obligation to submit lists of evidence under Rule 121(6). [Pre-trial Chamber] judges who thus act aggressively, but within the limits of their authority, can help to ensure far greater efficiency and, indeed, accuracy in the presentation of the evidence.<sup>187</sup>

To a large extent, Scheffer’s solution is a realistic approach. But his hope that Pre-Trial Chambers will learn to use their existing powers to shorten the proceedings seems optimistic in light of the proceedings in *Katanga and Ngudjolo*. And the different approaches taken by Pre-Trial Chambers I and III in relation to what evidence becomes part of the case dossier shows that they will need help in arriving at a charging process that is fair and efficient and which provides for equal justice for all suspects. There is no right to appeal a decision on the confirmation of charges, so errors may only be addressed only after a full trial. Eventually the Appeals Chamber may need to take the lead in ensuring equal justice between Chambers and the right of the parties to select the evidence upon which they wish to rely at any adversarial hearing.

Given the hurdles which would need to be overcome in order to amend the *Rome Statute*, it would be difficult to amend the *Rome Statute*.<sup>188</sup> However, a great deal could be accomplished through amendments to the Court Regulations. This

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<sup>186</sup> *Rome Statute*, *supra* note 1 at Article 61(7).

<sup>187</sup> Scheffer, *supra* note 59 at 155.

<sup>188</sup> A substantive amendment to the *Rome Statute* would require a two-thirds majority of States Parties and would have to be ratified or accepted and deposited with the UN Secretary General by seven-eighths of the States Parties, according to *Rome Statute*, *supra* note 1 at Article 121 (Amendments). Amendments of an institutional nature can be made more easily, but such amendments relate to administrative provisions only. See also Article 122 (Amendments to provisions of an institutional nature).

requires that amendments be supported by a majority of the judges.<sup>189</sup> The section of the Court Regulations which applies specifically to the Pre-Trial Chamber (Court Regulations 45 to 53) needs careful review. The following amendments might be considered:

- Court Regulation 48, entitled “Information necessary for the Pre-Trial Chamber,” should be amended to add a requirement that all materials relied upon by the Pre-Trial Chamber in order to exercise the functions and responsibilities set out in Article 58 must be redacted and disclosed as a matter of priority;
- Court Regulation 51, entitled “Decision on interim release,” should be amended to impose a duty to ensure the Defence is able to properly challenge the decision issuing the arrest warrant and any decision on interim release;
- Court Regulation 52, entitled “Document containing the charges,” should be amended to require that in the absence of extraordinary circumstances, the proposed charges must be notified to the accused person within ten days of the initial appearance;
- A new addendum to Court Regulation 52, perhaps entitled “Relevant evidence for purposes of confirmation of charges,” should be adopted to (1) to set stricter time-limits for the disclosure of the evidence to be relied upon by the Prosecution in support of the proposed charges; (2) to limit the case dossier to exculpatory evidence and the evidence relied upon by the parties; and (3) to provide suspects the right to waive a live hearing on the charges in favour of submitting on written pleadings; and
- Court Regulation 53, entitled “Decision of the Pre-Trial Chamber following the confirmation hearing,” should be amended to allow arrested persons to insist on responsive post-hearing briefing prior to official close of the confirmation hearing, which starts the sixty day period within which the Pre-Trial Chamber must file the decision on confirmation.

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The Court has accomplished a great deal in its first seven years of operation. Today the Prosecution is examining many Situations around the world and the Court is recognised as a source of justice by States who continue to refer their own territories for investigation. However, difficulties in obtaining arrests have limited the number of persons actually appearing before the Court.

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<sup>189</sup> *Rome Statute*, *supra* note 1 at Article 52. Regulations are adopted by an absolute majority and take effect immediately unless decided otherwise by the judges. States Parties are notified and have six months within which to object. In the absence of objections, the regulations remain in force.

Once persons are brought before the Court, the manner in which they are treated depends upon the Chamber to which their case is assigned. Delays in disclosing the basis for arrest warrants and in holding confirmation hearings, which are conducted in ways which cause undue publicity, are areas which could use improvement. However, given the super-majority requirement for amending the Statute, it is more likely that reforms will be accomplished through the process of amending the Court Regulations following judgements which will eventually be made by the Appeals Chamber.