

On Two Approaches to Communication of Evidence to the Pre-Trial Chamber

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1. Background

A confirmation process is provided for in Article 61 of the Rome Statute ('Statute') of the International Criminal Court ('ICC' or 'the Court'), by which a pre-trial chamber ('PTC') determines whether a case should be sent to trial.¹ More specifically, within a reasonable time after the person has been surrendered or has appeared before the Court voluntarily, the PTC shall hold a hearing to decide whether to confirm the charges on which the prosecutor intends to prosecute. It shall determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes in the document containing the charges, thereby confirming or declining to confirm the charges, or adjourning the hearing under statutory circumstances.

Pursuant to Rule 121(2) of Rules of Procedure and Evidence ('Rules') of the ICC, the PTC shall take the necessary decisions regarding disclosure between the prosecutor and the suspect before the confirmation hearing. Additionally, as provided by Rule 121(2)(c), all evidence disclosed between the prosecutor and the suspect for the purpose of the confirmation hearing shall be communicated to the PTC.

The communication of evidence to the PTC must not be confused with disclosure between parties. The PTC is not a party to the proceedings, nor does it take part in the disclosure process. This manner of bringing together two features with such different origins as the rules on disclosure and the rules on communication of certain evidence to the PTC constitutes a unique feature of the ICC's procedure.² For one, the requirement of communication is absent from the procedure of disclosure before the two

ad hoc tribunals, as indicated by Rule 66 of the Rules of the International Criminal Tribunal for Former Yugoslavia and International Criminal Tribunal for Rwanda. As regards domestic proceedings, such communication remains a civil law practice in jurisdictions where judges have access to the case file (*dossier de la cause*) before the trial.³

However, it seems that the ICC has had difficulty defining a consistent approach towards communication. The PTCs have been vexed in a dichotomy as regards the extent of evidence subject to communication, as examined below.

2. Practice: Two Approaches

The first approach was set forth by PTC I in *Prosecutor v. Thomas Lubanga Dyilo*. Mr. Lubanga was arrested allegedly responsible for war crimes arising from the situation in the Democratic Republic of the Congo.⁴ The single judge Sylvia Steiner provided that only the evidence on which the parties intended to rely should be communicated to the PTC ('the Lubanga Approach').⁵ This Approach is endorsed on the ground that only certain evidence is presented by the parties at the confirmation hearing according to the literal interpretation of Rule 121(2)(c) and its contextual interpretation with Rule 121(1).⁶ Highlighting the nature of the confirmation process, the impact on the right of defence, and the role of the PTC not as a finder of truth in relation to the guilt or innocence of the suspect, PTC I decided that other potentially exculpatory materials or what is otherwise relevant for the defence's preparation for the confirmation hearing and which the prosecution must disclose to the

1 William A. Schabas, Eleni Chaitidou and Mohamed M. El Zeidy, "Article 61", in Otto Triffterer and Kai Ambos (editors), *The Rome Statute of the ICC*, C.H. Beck, 2016, p. 1486.

2 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, para. 28 (<http://www.legal-tools.org/doc/052848/>).

3 Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 373.

4 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2-tEN, Warrant of Arrest, 10 February 2006 (<http://www.legal-tools.org/doc/59846f/>).

5 *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 2, paras. 41–43.

6 *Ibid.*

defence need not be communicated to the PTC.⁷

The Lubanga Approach has since been followed in the cases of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,⁸ *Prosecutor v. Bahar Idriss Abu Garda*,⁹ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*,¹⁰ *Prosecutor v. Callixte Mbarushimana*,¹¹ *Prosecutor v. Laurent Gbagbo*,¹² and *Prosecutor v. Charles Blé Goudé*.¹³

An alternative approach was outlined by PTC III in *Prosecutor v. Jean-Pierre Bemba Gombo*. Mr. Bemba was arrested on reasonable grounds to believe that he was criminally responsible for crimes against humanity and war crimes.¹⁴ At the time of rendering its disclosure decision, the Chamber was comprised of Judge Fatouata Dembele Diarra, Judge Hans-Peter Kaul and Judge Ekaterina Trendafilova. It decided unanimously that all the evidence disclosed between the parties should be shared with the Chamber and filed into the case record ('the Bemba Approach').¹⁵

In PTC III's view, the communication of evidence should be understood to cover all elements of disclosure between the parties so as to put the PTC in a position to ensure proper disclosure and make an informed decision in accordance with its statutory mandate.¹⁶ Under Article 69(3), second sentence, of the Statute, the PTC is allowed to request the submission of all evidence.¹⁷ Such communication is also justified in order to differentiate properly between the case that should go to trial and

those that should not.¹⁸ Noting the two different forms of disclosure encompassed under article 61(3) of the Statute (disclosure *stricto sensu* and inspection), PTC III deemed such extensive communication necessary in order to make its own assessment.¹⁹

This approach has later prevailed in the cases of *Prosecutor v. William Samoei Ruto et al.*,²⁰ *Prosecutor v. Francis Kirimi Muthaura et al.*,²¹ *Prosecutor v. Bosco Ntaganda*,²² *Prosecutor v. Dominic Ongwen*,²³ and *Prosecutor v. Ahmad Al Faqi Al Mahdi*.²⁴

The contradiction between the Lubanga and Bemba approaches has divided the ICC for several years. The main divergence is whether or not to communicate to the PTC the evidence disclosed between parties *that neither intends to rely on at the confirmation hearing*. The language of the Statute and Rules does little to clarify the issue. Judicial interpretation and exercise of discretion is required, but unfortunately divided. In the present author's view, it is the influence on the judges of two models of truth-seeking that causes the divide.

3. Pre-Trial Chamber: Hands Off or On?

There are different procedural models of truth-seeking. As lawyers we may from time to time exaggerate the importance of the differences between them. But it is well known that many national legal systems based on the civil law tradition tend to apply elements of the so-called inquisitorial system, whereas in common law countries the adversarial system is preferred.²⁵ As regards the role of judges, criminal proceedings in the inquisitorial system are led by a judge who takes a hands-on approach and is expected to actively discover the truth. In the adversarial system, the prosecution and defence are seen as adversaries; "the whole trial hinges on a contest between

7 *Ibid.*, paras. 50–58.

8 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-12-ENG ET, Transcript of Hearing, 14 December 2007, p. 4, lines 14–22 (<http://www.legal-tools.org/doc/03aafc/>).

9 *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-35, Second Decision on Issues Relating to Disclosure, 16 July 2009 (<http://www.legal-tools.org/doc/b57860/>).

10 *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-49, Decision on issues relating to disclosure, 29 June 2010 (<http://www.legal-tools.org/doc/2a3bac/>).

11 *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-87, Decision on Issues relating to Disclosure, 30 March 2011 (<http://www.legal-tools.org/doc/ae80d/>).

12 *Prosecutor v. Laurent Gbagbo*, ICC-02/01-01/11-30, Decision Establishing a Disclosure System and a Calendar for Disclosure, 24 January 2012 (<http://www.legal-tools.org/doc/3637f7/>).

13 *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-57, Decision Establishing a System for Disclosure of Evidence, 14 April 2014 (<http://www.legal-tools.org/doc/226a9a/>).

14 *Prosecutor v. Jean Pierre Bemba Gombo*, ICC-01/05-01/08-tENG, Warrant of Arrest for Jean Pierre Bemba Combo, 23 May 2008 (<http://www.legal-tools.org/doc/fb0728/>).

15 *Prosecutor v. Jean Pierre Bemba Gombo*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between Parties, 31 July 2008, para. 42 (<http://www.legal-tools.org/doc/15c802/>).

16 *Ibid.*, paras. 42–44

17 *Ibid.*, para. 10.

18 *Ibid.*, para. 29

19 *Ibid.*, paras. 45–49.

20 *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11-44, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011 (<http://www.legal-tools.org/doc/351827/>).

21 *Prosecutor v. Francis Kirimi Muthaura et al.*, ICC-01/09-02/11-48, Decision setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011 (<http://www.legal-tools.org/doc/12b91f/>).

22 *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-47, Decision Setting the Regime for Evidence Disclosure and other Related Matters, 12 April 2013 (<http://www.legal-tools.org/doc/4b9b48/>).

23 *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 27 February 2015 (<http://www.legal-tools.org/doc/43ce00/>).

24 *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-9, Decision on Issues Related to Disclosure and Exceptions thereto, 30 September 2015 (<http://www.legal-tools.org/doc/eff9b5/>).

25 Cassese, *supra* note 3, p. 365.

the parties”²⁶ and the judges keep their hands off.²⁷

It cannot be overstated that procedural law before the ICC is based on a unique compromise.²⁸ Nevertheless, we need to ask whether, for the purpose of the confirmation hearing, the judges should follow the adversarial model where judges tend to keep their hands off the active search for truth, or whether they should adopt a hands-on approach.

3.1. Mandate of the Confirmation Hearing

As consistently reiterated, the confirmation process is designed to protect the rights of the defence against wrongful and wholly unfounded charges,²⁹ ensuring that no case proceeds to trial without sufficient evidence to establish substantial grounds to believe that the suspect committed the crime charged. By acting as an organ of judicial scrutiny and review pre-trial,³⁰ the PTC is in a position to check and balance the prosecutor.³¹ Beyond such gatekeeping, the decision confirming the charges also delineates the factual scope of the case at trial from a combined reading of Article 61(7)(a) of Statute and Regulation 55 of the Regulations of the Court (‘Regulations’).³² It serves the procedural function to prepare the trial and resolve possible procedural issues thus pre-

venting that they taint the trial proceedings.³³ However, it is also emphasized that the confirmation hearing, as it has limited scope and purpose, was not intended to be a mini-trial or to provide a pre-judgment of the suspect.³⁴

Returning to the question of communication, the hands-on approach may contribute to the overall truth-seeking of the Court,³⁵ ensuring that the PTC can fulfil its filtering function and enhance judicial efficiency. However, the PTC under this approach would have access to all the evidence, including the potentially exculpatory and other materials that defence decides not to rely on at the hearing. As a result, the question arises whether the PTC has *de facto* encroached on the function of the trial chamber of pronouncing on the guilt or innocence of the accused.

On the other hand, only communicating the evidence that the parties intend to rely upon at the confirmation hearing may prevent the PTC from accessing all the information available and making a fully informed decision. It may be seen as undermining judicial economy and ultimately quality. But it may generate trust that the PTC will function properly in relation to the stage of the confirmation hearing without producing a trial before trial.

3.2. Nature of Communication

As provided in Rules 76-79, the disclosure regime encompasses both disclosure *stricto sensu* and inspection between the prosecutor and defence. All evidence disclosed between parties for the purpose of the confirmation hearing shall be filed in the case record and communicated to the PTC pursuant to Rules 121(2)(c) and 122(1). Such communication is designed to place the PTC in a position to properly organize and conduct the confirmation hearing.³⁶ Filing the evidence in the case record, accessible by all, also helps the victims to exercise their procedural rights properly and to guarantee the parties’ access to the evidence to be presented at the

26 *Ibid.*, p. 373.

27 Kai Ambos, “International Criminal Procedure: ‘Adversarial’, ‘Inquisitorial’ or ‘Mixed’?”, in *International Criminal Law Review*, 2003, vol. 3, pp. 3, 5; Claus Kress: “The Procedural Law of International Criminal Court in Outline: Anatomy of a Unique Compromise”, in *Journal of International Criminal Justice*, 2003, vol. 1, p. 604.

28 Alphons Orie, “Adversarial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC”, in Antonio Cassese, Paola Gaeta and John Jones (editors), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1485. See also Kress, *ibid.*, p. 604; Ambos, *ibid.*, pp. 3, 5.

29 *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 2, para. 37; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, para. 63 (<http://www.legal-tools.org/doc/67a9ec/>); *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the Decision on the Confirmation of Charges, 7 March 2011, para. 31 (<http://www.legal-tools.org/doc/5ac9eb/>); *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges against Dominic Ongwen, 23 March 2016, para. 14 (<http://www.legal-tools.org/doc/74fc6e/>).

30 Michela Miraglia, “The First Decision of the ICC Pre-Trial Chamber”, *Journal of International Criminal Justice*, vol. 4, 2006, p. 190.

31 Kai Ambos and Dennis Miller, “Structure and Function of the Confirmation of Procedure before the ICC from a Comparative Perspective”, in *International Criminal Law Review*, 2007, vol. 7, p. 341.

32 William A. Schabas *et al.*, *supra* note 1, p. 1488; see also *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, *supra* note 29, para. 32.

33 William A. Schabas *et al.*, *ibid.*, p. 1489; see also *Prosecutor v. Laurent Gbagbo*, Decision on the Date of the Confirmation of Charges Hearings and Proceedings leading thereto, 14 December 2012, ICC-02/11-01/11-325, para. 27 (<http://www.legal-tools.org/doc/c5cddf/>); *Prosecutor v. Dominic Ongwen*, *supra* note 29, para. 15.

34 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-trial Stage of the Case, 13 May 2008, para. 100 (<http://www.legal-tools.org/doc/285b52/>); *Prosecutor v. Bahar Idriss Abu Garda*, *supra* note 13, para. 10, *Prosecutor v. Dominic Ongwen*, *supra* note 29, para. 15.

35 *Prosecutor v. Jean Pierre Bemba Gombo*, *supra* note 15, para. 11.

36 Helen Brady, “Disclosure of Evidence”, in Roy S. Lee (editor), *The International Criminal Court: Elements of Crime and Rules of Procedure and Evidence*, Transnational Publishers, 2001, p. 424; see also *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 2, para. 30, *Prosecutor v. Bahar Idriss Abu Garda*, *supra* note 9, para. 7.

hearing before it commences, regardless of any shortcomings in the disclosure process.³⁷

With access to the evidence disclosed between the parties through communication, the presiding judge of the PTC can “determine how the hearing is to be conducted and in particular, may establish the order and the conditions under which he or she intends the evidence contained in the record of the proceedings to be presented” pursuant to Rule 122(1). On this basis, it may seem superfluous to communicate the evidence that neither party intends to rely upon at the hearing.

However, pursuant to Rules 121(10) and 131(2) a full and accurate record of all proceedings before the PTC, including all the documents transmitted to the PTC, will be kept by the Registry and transmitted to the Trial Chamber in question. This contributes to the preparation of the trial proceedings. In this sense, the communication of *all* evidence disclosed between the parties to the PTC may put the Trial Chamber in a better position to determine the truth.

3.3. Rights of the Parties

The hands-on approach has sufficient merit to protect the rights of the parties. The communication of *all* evidence provides the PTC with an opportunity to verify that the suspect has duly received the evidence to be disclosed by the prosecutor. It also allows the Chamber to check that the suspect has had adequate time and facilities for preparation.³⁸ Furthermore, it helps in a broad sense to seek the truth,³⁹ thus contributing towards guaranteeing a fair and expeditious trial.

However, for the purpose of the confirmation hearing, it is the right of the defence to decide whether to rely on certain evidence or materials disclosed by the prosecutor at the hearing,⁴⁰ depending on the defence strategy. Indeed, the defence need not present any evidence at the confirmation hearing pursuant to Article 61(6) and Rule 121(6). If the PTC draws on evidence that neither party intends to rely upon at the confirmation hearing through communication, it could be maintained that the defence has in fact lost his or her choice.

37 *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 2, para. 34.

38 *Prosecutor v. Jean Pierre Bemba Gombo*, *supra* note 15, para. 23.

39 *Ibid.*, paras. 11, 14–16.

40 *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 2, para. 53–54; *Prosecutor v. Jean Pierre Bemba Gombo*, *supra* note 15, para. 29.

4. Call for Consistency

On the question as to the extent of communication of evidence, the PTC seems to be pulled between following the hands-on practice seen in the so-called inquisitorial system or the hands-off approach of the adversarial system. As discussed, finding the equilibrium is proving challenging. Although the ‘Pre-Trial Practice Manual’ (as a “product of discussions” among the judges of Pre-trial Division⁴¹) endorses that the extent of communication should encompass “all evidence disclosed between parties during the pre-trial proceedings”,⁴² it does not provide further explanation and is not binding on the judges.

After 10 years of trial and error since the first confirmation hearing in 2006, the time has come for a unified approach to the communication of evidence to the PTC. This could be achieved through an amendment to the Regulations pursuant to Article 52 of the Statute to reduce inconsistency in the routine functioning of the Court.

All in all, the practice of the Court will have limited value outside the Court unless it provides further uniformity. This policy brief submits that an unequivocal approach to the communication of evidence to the PTC is required.

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41 ICC, Pre-Trial Practice Manual, September 2015, p. 4. After the first update came in February 2016, it was called ‘Chambers Practice Manual’.

42 *Ibid.*, p. 10.