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Greetings from the seat of the International Criminal Court in The Hague. My name is Enrique Carnero Rojo and I work at the Office of Public Counsel for Victims of the Court.

In the next hour, in my personal capacity, I will talk about article 61 of the Rome Statute, entitled "confirmation of the charges before trial".

This lecture is divided in three parts: firstly, I will talk about the negotiation and purpose of article 61; secondly, I will comment on each of the paragraphs of this article; and thirdly, I will briefly address the application of this provision by the Court.

Before I move on to each of these points in detail, you must know that article 61 envisages a hearing before a Pre-Trial Chamber to confirm the charges against the suspect, after a warrant of arrest or a summons to appear has been issued against him or her. During this hearing, the suspect may challenge those charges and, if successful, prevent the opening of a trial. Otherwise, if the Prosecution persuades the Pre-Trial Chamber, the trial will proceed on the charges confirmed by the judges.

This so-called "confirmation hearing", held before the opening of the trial pursuant to article 61 of the Statute, is a unique feature of the International Criminal Court. No other international criminal tribunal contemplates this proceeding. Before other tribunals, the Prosecutor submits an indictment to a single judge, who decides in the absence of the suspect whether to confirm it and if so, issues an arrest warrant. The trial eventually follows on said indictment, after the remaining pre-trial proceedings have been completed.

By contrast, as explained by the Appeals Chamber in the *Mbarushimana* case, the drafters of article 61 of the Statute specifically rejected the idea of an indictment procedure which had appeared in earlier drafts during the negotiation and replaced it with a new confirmation of charges hearing acceptable to delegations representing different national legal systems.

In fact, article 61 is the result of a compromise between legal traditions. The United States of America and Australia initially suggested an approach based on the model of the International Criminal Tribunals for Rwanda and the former Yugoslavia, which does not provide for the presence of the suspect in a hearing before the trial. By contrast, France and Argentina proposed a hearing in the presence of the person concerned before the trial. There were disagreements between the different delegations on the role to be played by the judges during the investigation, but they considered useful the judicial validation of the charges before the trial. As a consequence, delegations from these four countries eventually reached a common agreement with ten other States on a single scheme for pre-trial proceedings, whereby charges would be judicially confirmed with the participation of the person concerned upon his arrest, surrender or voluntary appearance.

It must be noted that the purpose of the confirmation hearing is not to find the truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued. This task is entrusted to the Trial Chamber and the Appeals Chamber if and after the charges are confirmed. As the Court has repeatedly stated, the confirmation hearing is not a "trial before the trial" or a "mini-trial". Moreover, the confirmation hearing is not meant to revisit the issuance of the warrant of arrest or to assess the manner in which the Prosecutor has conducted the investigation. The purpose of the confirmation hearing is to decide whether to confirm or not the charges on which the Prosecutor intends to put a suspect on trial by assessing the sufficiency of the results of the investigation. In other words, the Court separates the cases and charges which should go to trial from those which should not. By doing so, it protects suspects against unfounded accusations and ensures judicial economy.

Before addressing in detail each of the paragraphs of article 61, it is important to note that this article provides a chronological sequence for the confirmation of charges proceedings. After the initial appearance of the suspect and before the start of the hearing, article 61(3) mandates the Prosecutor to provide the suspect with a copy of the document containing the charges and the evidence to be relied upon during the hearing. Article 61(4) of the Statute clarifies that the provision of this material does not limit the Prosecutor's flexibility with respect to the charges brought because the Prosecutor may amend or withdraw the charges without the permission of the Pre-Trial Chamber before the confirmation hearing. Now once the confirmation hearing starts, the Prosecutor must present evidence up to the standard set up in article 61(5). During the hearing, article 61(6) grants the suspect the possibility to object to the charges and the evidence brought by the Prosecutor, and/or to present evidence. After hearing the submissions of the participants, Article 61(7) empowers the Pre-Trial Chamber to confirm, decline to confirm or request the Prosecution to consider amending the charges. If the charges are not confirmed, the warrant of arrest the suspect becomes ineffective pursuant to article 61(10). By contrast, if the charges are confirmed, the suspect becomes an accused and is committed to a Trial Chamber for judgement pursuant to article 61(11). Where the charges are confirmed, article 61(9) clarifies that if the Prosecution reassesses its theory about the suspect's liability for the crimes charged, the charges may be amended only with the permission of the Pre-Trial Chamber. The same paragraph provides that the Prosecution also requires permission from the Trial Chamber to withdraw charges that have been confirmed.

Addressing more in detail each paragraph of article 61, the first paragraph envisages that the confirmation hearing is to be held "within a reasonable time" after the suspect's surrender or voluntary appearance before the Court. Normally, the Pre-Trial Chamber decides and makes public the date for the confirmation hearing during the first appearance of the suspect, after consulting with the participants. In any event, as expressly found in the context of the Kenya situation, it is clear from the wording of context of the Kenya situation, it is clear from the wording of article 61(1) that this provision cannot be relied upon by potential suspects to be heard prior to the issuance of a warrant of arrest or a summons to appear against them.

Indeed, article 61(1) provides that the confirmation hearing must, in principle, take place after the suspect has surrendered to the Court or has been arrested. In the *Gbagbo* case, the judges emphasized the importance of the suspect's personal attendance throughout the sessions of the confirmation hearing, unless exceptional circumstances arise.

However, a suspect who has surrendered or has been arrested enjoys the possibility under article 61(2) to waive his right to be present during the confirmation hearing and may be allowed to observe the hearing from outside the courtroom while his counsel appears before the Pre-Trial Chamber. This is what happened for example during the hearings to confirm the charges against Mr Katanga.

Pursuant to article 61(2), the Pre-Trial Chamber may also hold confirmation hearings without the suspect being present where the suspect has fled or cannot be found. In this case, the Pre-Trial Chamber may hold consultations with the Prosecutor and the suspect's counsel about the possibility of holding the hearing in the absence of the suspect. For this purpose, the Chamber must ensure that an arrest warrant has been issued, that the warrant of arrest has not been executed "within a reasonable period of time", and last that "all reasonable measures" have been taken to locate and arrest the suspect. There is disagreement among scholars on the possibility to hold confirmation hearings if the suspect has decided not to appear before the Court. However, so far no confirmation hearings have taken place against any suspect who is at large. This is especially true for suspects who passed away while they were at large, without the charges against them being confirmed, such as Mr Lukwiya or Mr Gaddafi.

Before the confirmation hearing starts, article 61(3) imposes an obligation on the Prosecution to provide the suspect with a copy to provide the suspect with a copy of the document containing the charges and the evidence it intends to rely upon during the hearing. The Rules of Procedure and Evidence set specific time limits for the Prosecution's disclosure obligations under this article.

The document containing the charges is the document that frames the confirmation hearing. This document must establish in detail the nature, cause and content of the charges brought against the suspect and forms the basis for preparation for the confirmation hearing. Accordingly, the document containing the charges must include a precise statement of the facts, including the time and place of the alleged crimes, and a legal characterization of said facts to accord both with the crimes and the precise form of participation alleged against the suspect. Events charged with insufficient clarity will be considered as not being formally charged and therefore will not be assessed by the Pre-Trial Chamber.

The Prosecution may [charge] different modes of liability in the alternative, but such way of charging will be defective if not clarified during the confirmation hearing and it will not lead the Pre-Trial Chamber to confirm alternative charges.

In any event, as clarified by the judges in the *Lubanga* and *Katanga and Ngudjolo* cases, the Prosecution is not obliged to articulate in the document containing the charges its legal understanding of the alleged crimes and the various modes of liability, and it may mention events which occurred before or during the commission of the acts or omission charged, especially if that would be helpful to better understand the context of the charged conduct. In order to ensure the rights of the suspect, the document containing the charges must be filed in a language that the suspect fully understands and speaks.

When it comes to the evidence disclosed under article 61(3), the Court has found that this provision does not oblige the Prosecution to disclose to the Defense or to permit the Defense to inspect any material which the Prosecution does not intend to present at the confirmation hearing and which is neither potentially exculpatory nor material to Defense preparation for the confirmation hearing. In accordance with this provision, the Prosecution is usually ordered, for the purpose of its disclosure obligations to the Defense, to disclose all evidence on which it intends to rely at the confirmation hearing, including potentially exculpatory materials, and to allow the system of pre-inspection and inspection to be put in place. The disclosure and the inspection of evidence are regulated in detail in the Rules of Procedure and Evidence.

Now moving on to article 61(4), the wording of this provision proved unclear when it was first applied in the *Lubanga* case, but the Appeals Chamber has eventually clarified that there is no temporal limit for the Prosecutor's investigation. In other words, the Prosecutor's power to investigate remains unaffected by the confirmation hearing, and the Prosecutor does not need to seek judicial authorization to continue the investigation during and after the confirmation hearing. Ideally, it would be desirable for the investigation to be completed by the time of the confirmation hearing, but this is not a requirement of the Statute. Similarly, article 61(4) clarifies that the provision of the document containing the charges alone does not limit the Prosecutor's flexibility with respect to the charges brought. Before the confirmation hearing, the Prosecutor may continue the investigation, and may amend or withdraw charges without the permission of the Pre-Trial Chamber.

By contrast paragraphs 5 and 6 of article 61 regulate what the Prosecutor must do and what the Defense may do, respectively, during the confirmation of charges hearing.

Pursuant to article 61(5), the Prosecutor must support each charge with sufficient evidence to establish substantial grounds to believe that the suspect committed the crimes charged. For this purpose, the Prosecution need not present at the confirmation of charges hearing all incriminating evidence that [might be in its possession], particularly the one on which the Prosecution relies the least. In fact, article 61(5) expressly provides that the Prosecutor may rely on documentary and summary evidence and need not call the witnesses who will testify at trial. This is consistent with the limited purpose of the confirmation hearing that I have explained earlier, and also satisfies the right of the suspect to have the confirmation hearing held within a reasonable time.

In this regard, the Appeals Chamber ruled in the *Mbarushimana* case that the Pre-Trial Chamber can evaluate the credibility of the witnesses without their in-person testimony and recognised that rules regarding orality in the pre-trial phase are more relaxed than at trial. However, the Appeals Chamber also found that the Pre-Trial Chamber must consider on a case-by-case basis whether and what steps may be necessary to ensure that the use of documentary or summary evidence instead of in-person testimony during the confirmation hearing is consistent with the rights of the suspect and a fair and impartial trial, because this type of evidence limits the Pre-Trial Chamber's ability to evaluate the credibility of the witnesses. As a result, although the use by the Prosecution of summaries rather than redactions of witness statements is the appropriate mechanism for the Prosecution to discharge its disclosure obligations, most Pre-Trial Chambers find that said summaries have a lesser probative value than unredacted parts of witness statements, especially if they concern anonymous witnesses.

In practice, the Prosecution relies on a small number of *viva voce* witnesses during the confirmation hearings, presumably in order to avoid the witnesses' intimidation, any unnecessary risk to their safety and a reduction in the evidentiary value of their testimony during the subsequent trial. For instance, the Prosecution called three *viva voce* witnesses in the confirmation hearing in the *Abu Garda* case, one in Lubanga, and none in the proceeding concerning *Ruto* and *Muthaura*

In turn, article 61(6) provides the person charged with the right to challenge the evidence presented by the Prosecutor and to present his or her own evidence. If the suspect exercises this right, the Pre-Trial Chamber must evaluate the contested evidence and resolve any ambiguities, contradictions, inconsistencies or doubts as to credibility introduced by the contestation of the evidence. The suspect enjoys a broad scope of action in this regard, since under this provision a suspect may contest at the confirmation hearing both matters of statutory interpretation and evidential aspects of the Prosecution's case. The effective exercise of the right to challenge the evidence depends on the Prosecution's disclosure as soon as possible of any potentially exculpatory excerpts in the statements of witnesses on whose written or oral testimony the Prosecution intends to rely on at the confirmation hearing. In turn, this right is also linked to the right of the suspect to have adequate time and facilities for the preparation of the defense, and to communicate freely and in confidence with counsel of his or her own choice.

After the evidence has been presented and the participants have been heard, the Pre-Trial Chamber determines whether, on the basis of the confirmation hearing, there is sufficient evidence to establish "substantial grounds to believe that the person committed each of the crimes charged". This legal standard phrased in paragraph 7 of article 61, namely "substantial grounds to believe that the person committed each of the crimes charged", confirms that the Pre-Trial Chamber is not a finder of truth in relation to the guilt or innocence of the suspect. However, the Pre-Trial Chamber is required to evaluate the evidence and draw conclusions from it in order to make a determination as to its sufficiency for trial. Moreover, the Appeals Chamber has reaffirmed the power of the Pre-Trial Chamber to consider jurisdictional issues at the confirmation hearing, deciding on them during its determination of whether the Prosecutor has submitted sufficient evidence to establish substantial grounds to believe that the charged crimes were committed

But what is this evidentiary standard, namely "substantial grounds to believe" that the charged crime was committed? Several Chambers have explained that this means that after the confirmation hearing the Pre-Trial Chamber need not be convinced beyond a reasonable doubt of the suspect's guilt, a standard required in article 74 of the Statute for the Trial Chamber to convict the accused after the trial. At the same time, the Appeals Chamber clarified in the *Al Bashir* and the *Mbarushimana* cases that article 61 imposes a higher evidentiary threshold than the lower "reasonable grounds" standard used for issuance of warrants of arrest or summons to appear under article 58 of the Statute. In this context, some Pre-Trial Chambers have defined the standard in article 61(7) of the Statute as an "intermediate evidentiary threshold". This evidentiary threshold applies to all facts and circumstances of the case and is the same for all factual allegations, whether they pertain to the individual crimes charged, the contextual elements of the crimes or the criminal responsibility of the suspect.

In order to meet this evidentiary threshold, Chambers have consistently held over the past ten years that the Prosecution must offer "concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations". In turn, the Pre-Trial Chamber must be thoroughly satisfied that the Prosecutor's allegations are sufficiently strong to commit the person for trial.

In this regard, the Appeals Chamber clarified in the *Mbarushimana* case that there is no provision precluding the Pre-Trial Chamber from evaluating the evidence as required by article 61(7) of the Statute or otherwise limiting the Chamber's authority to freely assess the evidence. However, the Appeals Chamber also noted that this is not to say that the Pre-Trial Chamber's ability to evaluate the evidence is unlimited or that its function in evaluating the evidence is identical to that of the Trial Chamber. In practical terms, this means that unless a party provides information during the confirmation hearing which can reasonably cast doubt on the authenticity of the evidence presented by the opposing party, such evidence must be considered authentic in the context of the confirmation hearing. A wholesale assessment as to the admissibility of each item of evidence at this stage would unjustifiably delay the proceedings and give rise to an inappropriate pre-determination of evidentiary matters which should be properly decided in light of the whole of the evidence presented at trial.

The Appeals Chamber has also held that the Pre-Trial Chamber is not required, as a matter of principle, to fully test the reliability of every piece of evidence relied upon by the Prosecutor for the purpose of the confirmation of charges hearing. In fact, the Pre-Trial Chamber enjoys discretion in this regard in line with the principle of free assessment of evidence. In line with this principle, the Pre-Trial Chamber determines the probative value of each piece of relevant evidence, which as such must be rationally linked to the facts that it tends to prove or to disprove. Moreover, some Chambers have found that they are guided in their evidentiary assessment by the principle of in *dubio pro reo* as a component of the presumption of innocence enjoyed by the suspect.

All in all, the Pre-Trial Chambers take a case-by-case approach in assessing the relevance and probative value of each piece of evidence. In doing so, they are guided by various factors, such as the nature of the evidence, its credibility, reliability, and source, as well as the context in which it was obtained and its nexus to the charges of the case or the alleged perpetrator.

Eventually, it is not the amount of evidence presented but its probative value that is essential for the Pre-Trial Chamber's final determination on the charges presented by the Prosecutor.

The decision on the confirmation of the charges, which must be concurred by a majority of the Pre-Trial Chamber, should be delivered within 60 days following the confirmation hearing. This time limit usually starts from the date the Defense files its final written submissions after the hearing, and may be extended or reduced by the Chamber if exceptional circumstances so warrant.

Article 61(7) identifies the four possible results of the confirmation hearing, namely a decision to confirm the charges; a decision declining to confirm the charges; a decision to adjourn the confirmation hearing and request further evidence or further investigation from the Prosecution; and finally, a decision to adjourn the confirmation hearing and request the Prosecution to amend the charges. I will briefly address each of these four scenarios.

In the first scenario, when the Pre-Trial Chamber determines the existence of substantial grounds to believe that the suspect committed one or more of the charged crimes, it issues a decision confirming the charges and committing the suspect to a Trial Chamber for trial *on the charges* it has confirmed, as established by article 61(7)(a). In the first cases before the Court, such as *Lubanga* and *Bemba*, the decision confirming the charges was found to be the only document which could serve as a reference during the subsequent trial proceedings, even when it did not provide a readily accessible statement of the facts underlying each confirmed charge. By contrast, in subsequent cases, such as those in the *Kenya* situation, the Court found that the confirmation decision could not be expected to serve as the only authoritative statement of the charges for the trial. In these cases, after the charges were confirmed by the Pre-Trial Chamber, the Trial Chamber ordered the Prosecution to file a document containing the charges amended to harmonise it with the findings made in the confirmation decision and with the exact language of said decision. These two divergent approaches to the use of the decision confirming the charges seem to be disappearing at present, as the Pre-Trial Chambers have streamlined the confirmed charges in their latest decisions.

In any event, the facts and circumstances contained in the confirmed charges, and in the confirmed charges alone, determine the factual ambit of the case for the purposes of the trial and circumscribe it by preventing the Trial Chamber from exceeding that factual ambit in its judgement. In this regard, the Appeals Chamber in the *Lubanga* case defined the facts described in the charges as those "factual allegations which support each of the legal elements of the crime charged". These refer to the essential facts constituting the elements of the crimes charged and have been denominated "material facts and circumstances" by some Trial Chambers. By contrast, all the facts and circumstances that are referred to in the document containing the charges or in the decision on the confirmation of charges but that do not appear in the confirmed charge have no delimiting or constraining power on the Trial Chamber. They are not "material" but "subsidiary" facts. These are facts referred to in the decision on the confirmation of the charges for the purpose of demonstrating or supporting the material facts and providing background information.

This distinction between material and subsidiary facts is important because the Trial Chamber cannot exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber, the so-called material facts. By contrast, the subsidiary facts contained in the decision confirming the charges do not have any limiting power *vis-à-vis* the Trial Chamber when rendering its judgment.

The decision confirming the charges is biding not only on the Trial Chamber but also on the participants. The participants are expected to prepare the subsequent trial on the basis of the charges as confirmed by the Pre-Trial Chamber, and to take into consideration the evidence that is relevant only to the charges confirmed. In this regard, whereas the Prosecution is not necessarily required to rely entirely on the same evidence at trial as it did at the confirmation of charges stage, it cannot seek to rely at trial on facts and circumstances going beyond the confirmed charges.

Addressing now the situation foreseen in article 61(7)(b) of the Statute, namely a decision by the Pre-Trial Chamber to decline to confirm the charges, this decision ends the prosecution of the suspect. As a result, any warrant of arrest and other restrictive measures cease to have effect in accordance with article 61(10) of the Statute. If the Pre-Trial Chamber has confirmed some allegations but dismissed others based on the lack of sufficient evidence establishing substantial grounds to believe, the Prosecution cannot include the discarded allegations in its subsequent, if any, formulation of the confirmed charges. Nonetheless, if the evidence is found to be insufficient, article 61(8) of the Statute provides that the Prosecutor is not precluded from subsequently requesting the confirmation of charges on the basis of additional evidence.

Now in the third scenario described in article 61(7)(c), the Pre-Trial Chamber may issue a decision to adjourn the confirmation hearing and request further evidence or further investigation from the Prosecution. This happens where the Prosecutor's evidence, viewed as a whole, although apparently insufficient, does not appear to be so lacking in relevance and probative value the Chamber with no choice but to decline to confirm the charges. This happened for instance in the *Gbagbo and Blé Goudé* case, where the Pre-Trial Chamber found inadequate the Prosecutor's evidence in relation to the charges, but also that there remained a degree of suspicion in relation to the alleged commission of the crimes. As a consequence, the Chamber did not exclude that the Prosecutor might be able to present or collect further evidence in relation to the alleged crimes. As a result, the hearing was adjourned and the charges were eventually confirmed upon the submission of further evidence by the Prosecution. In this regard, it must be noted that the Pre-Trial Chamber cannot oblige the Prosecution to present further evidence or to conduct further investigations pursuant to article 61(7)(c)(i). As found by the Pre-Trial Chamber in the *Katanga and Ngudjolo* case, the Chamber may only request the Prosecution to consider the opportunity to provide additional evidence.

Lastly, and the fourth possibility envisaged in article 61(7)(c) of the Statute is for the Pre-Trial Chamber not to confirm the charges but to invite the Prosecutor to consider amending them if the Chamber is of the view that the evidence establishes a different crime. It is important to note that the Pre-Trial Chamber is not vested with the authority to modify the charges brought by the Prosecutor against a suspect. In particular, the Court found in the *Ruto* and *Kenyatta* cases that the Pre-Trial Chamber does not have the power either to confirm a charge that is not specified by the Prosecutor or to clarify that the charge includes acts in addition to those specified by the Prosecutor.

When the evidence appears to establish a different crime, the most the Pre-Trial Chamber may do is to request the Prosecution to consider amending a charge. Such a request must be made on the basis of the confirmation of charges hearing and in light of the evidence submitted. It is the Prosecution which would then amend such a charge, not the Pre-Trial Chamber. In any event, consistent with the principle of prosecutorial discretion, the Pre-Trial Chamber is not vested with the authority to request the Prosecutor to consider adding a new charge, namely to expand the factual ambit of the charges originally presented.

It must also be noted that a decision adjourning the confirmation hearing under article 61(7)(c) of the Statute is not a decision declining to confirm the charges under article 61(7)(b) of the Statute and does not represent a final disposal of the merits of the case by the Pre-Trial Chamber. As such, the decision has no effect on the previous finding in relation to the warrant of arrest that there are reasonable grounds to believe that the suspect committed a crime within the jurisdiction of the Court. As found in the *Gbagbo* case for instance the fact that the available evidence does not meet the evidentiary threshold for article 61(7) and that the confirmation hearing is adjourned does not mean that there was not enough evidence for the purposes of issuing an arrest warrant against the suspect.

Now moving on to the amendment of the charges after the hearing, regulated in article 61(9), it must be noted that nothing in the Statute and the Rules of Procedure and Evidence prevents the filing by the Prosecution before the Trial Chamber of an amended charging document in which the facts and their legal characterisation are adjusted in light of the Pre-Trial Chamber's decision confirming the charges. Said document was filed, for instance, in the *Katanga and Ngudjolo* case. By contrast, new facts and circumstances not described in the confirmed charges may only be added under the procedure of article 61(9) of the Statute, since the incorporation of new facts and circumstances into the subject matter of the trial would alter its fundamental scope. This means that after the charges have been confirmed and before the trial has begun, only the Prosecution may amend the charges, with the authorization of the Pre-Trial Chamber.

In this regard, the Appeals Chamber explained in the *Lubanga* case that the Trial Chamber may not amend the charges on its own because it is the Prosecutor who is tasked with the investigation of crimes under the jurisdiction of the Court and who brings charges against suspects. At most, the Trial Chamber may, pursuant to regulation 55 of the Regulations of the Court, change the legal characterisation of the facts confirmed by the Pre-Trial Chamber. This means that the power to frame the charges lies at the heart of the Pre-Trial Chamber's functions, as set out in article 61 of the Statute. Although the Trial Chamber is not bound by decisions of the Pre-Trial Chamber on evidential or procedural issues, the Trial Chamber does not have the power to review the decision on the confirmation of charges, which is definitely binding on the Trial Chamber.

Nonetheless, several Chambers have clarified that the binding character of the decision on the confirmation of charges on the Trial Chamber is limited to the facts and circumstances described in the confirmed charges - the so-called material facts and circumstances facts and circumstances to which I have referred before. Consequently, if the Prosecution wishes to amend said material facts, it must obtain permission from the Pre-Trial Chamber with a request properly supported and justified.

Now granting permission pursuant to article 61(9) of the Statute to amend the charges confirmed entails consideration of the Prosecutor's request and an evaluation of other relevant information which the Pre-Trial Chamber could seek if necessary for the purposes of its final decision. In the *Kenyatta* and *Ruto* cases, the Pre-Trial Chamber further clarified that deciding on requests for amendment under this provision requires taking into consideration diverse factors, including whether granting permission to amend will negatively affect other competing interests, such as the rights of the accused to be informed promptly of the nature, cause and content of the charges, to have adequate time and facilities for the preparation of the defense, and to be tried without undue delay. In order to add further charges or substitute charges with more serious ones, a new confirmation hearing must be held before the Pre-Trial Chamber.

It must be noted that, pursuant to article 61(9), the Pre-Trial Chamber may allow the amendment of the confirmed charges only before the trial has begun. However, no definition is provided in the Statute or the Rules of Procedure and Evidence as to when the trial is considered to start. The drafters of the Statute, who deliberately adopted a hybrid procedure which borrows from different legal cultures and systems, intended the commencement of the trial to mean both the start of the proceedings before the Trial Chamber and the commencement of hearings on the merits, depending on the provision to be applied and the context in which it was to be applied. The Appeals Chamber has still not clarified the meaning of the expression "before the trial has begun" for the purpose of amending the charges under article 61(9). However, the Appeals Chamber has found in *the Ruto and Sang* case that an amendment of the charges under this provision is no longer possible after the opening statements, and that the entire process of amending the charges must be completed by that time, including the granting of permission for the amendment by the Pre-Trial Chamber. The only modification possible under the Court's legal framework once the trial has started is a change to the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court.

Article 61(9) also provides that after the commencement of the trial, it is only the Prosecution that can withdraw the charges, but with the permission of the Trial Chamber. As shown in the *Kenyatta and Muthaura* case, in deciding whether to grant or not a request by the Prosecution to withdraw the charges, the Trial Chamber assesses the Prosecution's submissions on whether the evidence supports the charges against the accused, and the position of the accused towards the request for withdrawal of charges.

Now finally Articles 61(10) and (11) address the consequences of a decision not to confirm or to withdraw charges, and of a decision to confirm the charges, respectively. In this regard, when a decision not to confirm the charges against a suspect becomes final, such as in the *Mbarushimana* case, proceedings related to the case at hand come to an end. Nonetheless, if there remain procedural matters pertaining to the case, triggered in the course of the proceedings, these cannot be left unresolved without judicial intervention from the Chamber which has been seized of the case. Similarly, when a withdrawal of the charges is authorized by the Trial Chamber, such as in the *Kenyatta and Muthaura* case, the arrest or conditions imposed on the accused cease to have effect, and all pending requests or applications by the accused become moot. However, protective measures ordered in respect of victims and witnesses continue after the proceedings have been concluded and the classification of non-public documents remains in place until otherwise ordered by the Chamber.

In turn, after the charges are confirmed by the Pre-Trial Chamber, article 61(11) provides that the Pre-Trial Chamber is no longer seized of any matter in the case and the Trial Chamber is responsible for the conduct of the subsequent proceedings, namely the preparation of the trial and the trial itself. For this purpose, the Trial Chamber may exercise any function of the Pre-Trial Chamber is relevant and capable of application in those proceedings, except for the authority over the confirmed charges, which remains with the Pre-Trial Chamber until the trial has begun. Once the trial has started, the Trial Chamber may exercise some functions of the Pre-Trial Chamber pursuant to article 61(11) of the Statute, such as reviewing the release or detention of the accused, and ruling on requests by the accused for provisional release and cooperation.

You may have noticed that in my remarks on each of the eleven paragraphs of article 61 of the Statute, I have not referred to participants other than the Prosecution and the Defense. This is because the text of article 61 does not expressly envisage other participants. However, other actors usually play an active role in the confirmation proceedings.

In particular, although article 61 does not expressly grant victims a right to participate in confirmation hearings, during the negotiations on the Rules of Procedure and Evidence, specific proposals were made for the participation of victims and it was decided that such participation would be regulated by a general section applicable to all proceedings. Accordingly, the Rules oblige the Court to give "adequate publicity" of its decisions to hold confirmation hearings so that victims may apply for participation in said hearings. During the confirmation hearing, victims will almost always have "personal interests" at stake, as required by article 68(3) of the Rome Statute for the victims to be allowed to participate in the proceedings. In fact, victims have been authorised to participate in all confirmation hearings held to date, making submissions on the evidence during the hearings and/or questioning the witnesses.

States may also be allowed to participate in confirmation proceedings if invited to do so as *amicus curiae* by the Pre-Trial Chamber. Moreover, if a State challenges the jurisdiction of the Court or questions the admissibility of the case, such challenge or question may be joined to the confirmation hearing, as long as it does not cause undue delay, and it will be decided first. Otherwise, such challenge or question must be decided before the confirmation hearing, as it happened in the *Ruto and Kenyatta* cases.

Last but not least, the Pre-Trial Chamber may put questions to a witness before, during or after the examination by the parties during the confirmation hearing, as found in the *Lubanga* case. The Pre-Trial Chamber may also call witnesses and experts.

As a last remark, I would like to note that the rationale of the confirmation proceedings envisaged in article 61 of the Statute has sometimes been challenged on the basis of the length and costs of the proceedings leading to confirmation decisions, the eventual lack of relevance of such decisions, and the delay that such proceedings may cause in the organisation of the subsequent trials. However, it appears to me that confirmation hearings are justified by the need to provide for the early dismissal of cases lacking a substantive evidentiary basis, and by the need to identify clearly and in detail the facts of those cases deserving a trial. I am sure that with time the practice of the Court will ensure that confirmation proceedings are a cost-effective tool for this purpose.

Many thanks for your attention. If you are further interested in article 61 of the Rome Statute, you can read a more detailed commentary on this website.

Good-bye and good luck.