

THE CONFIRMATION OF CHARGES PROCESS AT THE INTERNATIONAL CRIMINAL COURT: A CRITICAL ASSESSMENT AND RECOMMENDATIONS FOR CHANGE



WAR CRIMES RESEARCH OFFICE
International Criminal Court
Legal Analysis and Education Project
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ABOUT THE WAR CRIMES RESEARCH OFFICE

The core mandate of the WCRO is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the ICTY and ICTR, established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or "hybrid" war crimes tribunals have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon. It has also provided similar assistance to mechanisms and institutions involved in accountability efforts for serious international crimes at the domestic level, including the War Crimes Section of the Court of Bosnia and Herzegovina, Argentina's Assistance Unit for Cases of Human Rights Violations Committed under State Terrorism, Peru's Instituto de Defensa Legal (dedicated to representing victims in serious crimes cases before Peru's National Criminal Court), and the U.S. Department of State's Office of Global Criminal Justice.

The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in view of how significant the impact of the Court's early decisions are likely to be on the ICC's future and in recognition of the urgent need for analytical critique at early stages of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO took on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

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*A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad,
2007, courtesy Shane Bauer*

*The International Criminal Court building in The Hague, courtesy
Aurora Hartwig De Heer*

A village elder meets with people from the surrounding area.

Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer

*Archbishop Desmond Tutu and Minister Simone Veil at the second
annual meeting of the Trust Fund for Victims, courtesy ICC Press
Office*

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EXECUTIVE SUMMARY

Article 61 of the Rome Statute establishing the International Criminal Court (ICC) creates a process unique among international criminal bodies: the confirmation of charges process. Specifically, the article provides that, prior to committing a suspect to trial before the Court, a Pre-Trial Chamber of the ICC shall hold a hearing to assess whether the Prosecution has presented sufficient evidence to establish substantial grounds to believe that the suspect bears responsibility for the charged crime or crimes. In theory, the confirmation process is intended to achieve several goals, including ensuring prosecutorial fairness and efficiency, protecting the rights of the suspect, and promoting judicial economy.

However, as evidenced in the detailed review in this report of the twelve confirmation hearings held at the ICC to date, in practice, the process has fallen far short of achieving these goals. Indeed, rather than promoting efficiency, the confirmation process has added significant time to the overall length of trials before the ICC, with the shortest amount of time between a suspect's initial appearance and a decision on whether to confirm the charges being more than seven months and the longest period being more than two and a half years. Furthermore, the delay a suspect faces to actually get to trial does not end once the decision confirming charges is issued, as both the Defense and the Prosecution can file a request for leave to appeal the decision. Following a decision by the Pre-Trial Chamber on this request, and, if granted, a decision by the Appeals Chamber, the Presidency must constitute a Trial Chamber to handle the case, which has taken up to three months. At that point, the Trial Chamber can begin to set a date for trial, although the actual start of trial is frequently delayed by issues such as those relating to disclosure, translations, witness security, *etc.* Issues regarding the precise nature of the charges against the accused have also persisted well into the trial due to Trial Chambers' extensive use of a regulation that permits the Court to change the legal characterization of the facts under certain circumstances during the trial, meaning that the Court is spending on average more than fourteen months to confirm charges that may be substantially altered over the course of trial.

While one could argue that the confirmation process has at least protected certain suspects from being required to undergo a lengthy trial on unmeritorious charges, it seems clear that the cases that have not been confirmed have been so weak that the charges could have been easily disposed of pursuant to a process far less extensive than that which has come to characterize Article 61 proceedings. Finally, in those cases that have proceeded to trial, the Pre-Trial Chambers have produced lengthy decisions assessing the charges against the suspect in detail, raising questions not only about judicial economy, but also as to whether the process is consistent with the right to be presumed innocent until a finding of guilt beyond a reasonable doubt.

Given the disconnect between the drafters' and the Court's intentions regarding the confirmation process and the way that process has played out in practice, it is clear that changes to the system are in order. Notably, two serious initiatives have been undertaken in recent months, one by the judges of the Court and one by a group of outside experts, aimed at improving the confirmation process. However, the changes proposed by each of these initiatives appear insufficient to render the overall scheme consistent with the goals of the drafters and the Court itself. Thus, this report recommends a fundamental restructuring of the confirmation process.

One way to bring about such a dramatic restructuring – albeit not the one we ultimately recommend – is to significantly expand the confirmation process in a manner that would result in a case being much more “trial ready” than is currently the case. Notably, some of the Court's Pre-Trial Chambers appear to be increasingly moving towards this approach. For instance, although the provisions governing disclosure only require that the parties share with each other and with the Pre-Trial Chamber the evidence upon which they intend to rely at the confirmation hearing, some Chambers have required that the Prosecutor disclose all exculpatory evidence prior to confirmation and that all evidence disclosed between the parties be shared with the Chamber in order to assist it in its “truth seeking” function. Additionally, one Chamber went so far as to adjourn the confirmation proceedings to demand more evidence from the Prosecution on the theory that the Prosecution is required to present its strongest case against the suspect at the confirmation hearing, based on a largely completed investigation. This position not only directly contradicts the plain language of Article 61, which states that the Prosecution need only present sufficient evidence to establish substantial grounds to

believe the charged crimes have been committed, but is also at odds with the fact that Article 61 expressly authorizes the Prosecution to rely on summary evidence at confirmation. Furthermore, even if a prolonged confirmation process reduces the amount of preparation required at the trial stage, there will undoubtedly be issues that need to be resolved by the Chamber that will ultimately be deciding on the guilt of the accused, meaning the overall time savings are likely to be insignificant in terms of protecting the suspect's right to a speedy trial and judicial efficiency. A prolonged confirmation stage would be even more problematic for suspects whose cases are ultimately not confirmed, as it means such suspects would be deprived of liberty for a substantial period of time before a determination is made that the charges against them did not meet the low standard that is to be applied at confirmation.

The other option for a fundamental change in the confirmation process is to significantly scale back the proceedings in a way that realigns the confirmation process with the intent of the drafters, which is the approach recommended in this report. Specifically, we recommend requiring that the confirmation process be conducted solely on the basis of written submissions and that it be completed within ninety days of a suspect's first appearance before the Court, absent exceptional circumstances. As detailed in the report, this could be achieved through a series of amendments to the ICC's Rules of Procedure and Evidence and Regulations of the Court, coupled with a basic shift in the approach of the Pre-Trial Chambers regarding their role in the confirmation process. Specifically, we recommend three amendments to the ICC's Rules:

- First, the Rules would need to be revised to provide that the "hearing" referred to in Article 61 would be limited to a non-evidentiary, non-testimonial hearing. This would mean that the parties would be given a brief opportunity to present their arguments for and against confirmation and the Chamber would be able to pose clarifying questions to the parties. However, the Chamber would primarily base its confirmation decision on the Document Containing the Charges (DCC), together with supporting evidence, and a written response from the Defense. Limiting the Prosecution to presenting the DCC with supporting evidence is consistent with the notion that the confirmation process is not intended to be a "mini-trial," which is a theme that dates back to the drafting of the Rome Statute and has been consistently

espoused, at least in theory, by the Court. At the same time, this approach will permit the Pre-Trial Chamber to perform its task of evaluating whether the Prosecution has presented sufficient evidence to establish substantial grounds to believe each charge and will give the suspect the opportunity to exercise his or her rights under Article 61(6) of the Rome Statute to object to the charges; challenge the Prosecution's evidence; and present his or her own evidence.

- Second, we recommend that the Rules be amended to set forth strict time limits governing the written submissions upon which the Pre-Trial Chamber will render its confirmation decision. Consistent with the Prosecution's stated strategy of being as trial-ready as possible from the start of proceedings, we recommend requiring the submission of the DCC within thirty days of the suspect's first appearance. Of course, the rule could allow for an extension of this time period in exceptional circumstances. We would then recommend that the Defense be given thirty days to prepare a written response, which is consistent with the current framework requiring that the Defense receive the DCC thirty days prior to the hearing.
- Finally, in order to ensure that the parties are able to operate within the recommended time frame, the Rules of Procedure and Evidence should be amended to strictly limit pre-confirmation disclosure between the parties, which has been one of the primary causes of delay at the confirmation stage. In particular, we recommend that the Rules provide that the parties disclose only that evidence upon which they directly rely in their written submissions (i.e., the Document Containing the Charges and response thereto) and postpone the disclosure of exculpatory evidence until after confirmation. Further, the amended Rules should eliminate the availability of redactions to evidence at the pre-confirmation stage, thereby leaving it to the Prosecution to disclose summaries of evidence containing sensitive information, as expressly contemplated under Article 61(5) of the Rome Statute. Such changes would save substantial time and resources, as they will result in a significant decrease in the number of documents disclosed, circumventing delays related to missed disclosure deadlines, time-consuming translations and redactions of disclosed documents, and the need to allow the Defense time to review many thousands of pages of documents in advance of the hearing.

Although it may seem detrimental to the Defense to delay the disclosure of potentially exculpatory evidence until after charges have been confirmed, there is a strong argument to be made that the right to such evidence does not attach until post-confirmation, as the right to exculpatory evidence is found under Article 67, which is entitled “rights of the accused,” as opposed to the “rights of suspects.” In any event, Article 67(2) requires only that exculpatory material be shared with the Defense “as soon as practicable,” and a rapid confirmation process may actually ensure that the Defense start receiving such evidence earlier than it has in many of the cases to date. It is also worth noting that no case to date has failed to pass the confirmation stage due to one or more pieces of exculpatory evidence. Rather, each case that has been dismissed at the confirmation stage has failed due to the insufficiency of inculpatory evidence presented by the Prosecution. Lastly, even under the recommended scenario, persons charged with crimes by the ICC will remain in a better position than suspects at other international criminal bodies, as they will have the opportunity very early in the process to put forward evidence gathered through their own investigations which may exonerate them. Thus, a suspect subjected to truly “unfounded” charges – such as one with an unimpeachable alibi or one who has been the victim of mistaken identity – has a built-in procedural opportunity to establish his or her innocence at the outset.

In addition to the forgoing amendments to the Rules, we recommend that the Regulations of the Court be amended as follows:

- First, the Regulations should require the Pre-Trial Chamber’s decision under Article 61 within thirty days of the Defense’s written submission responding to the Document Containing the Charges. Although the judges are currently given sixty days to issue this decision, the Chambers will be in a position to deliver more timely decisions because they will be limited to reviewing only that evidence directly relied upon by the parties in their written submissions. Importantly, this limited review of evidence, which stands in stark contrast to the approach taken by some Chambers to date, is consistent with the process envisioned by the drafters of the provisions governing the confirmation process. Furthermore, Pre-Trial Chambers will be able to work within the thirty-day time limit by writing shorter decisions dedicated solely to establishing whether the Prosecution has met the minimal

burden established by Article 61. Importantly, if the Pre-Trial Chambers truly apply this minimal standard, which they repeatedly espouse in theory, the parties could adjust their own approach to the confirmation process, rather than using the confirmation stage as a means of testing the cases they plan to litigate at trial.

- In addition to shortening the time within which the Pre-Trial Chamber must issue its decision under Article 61(7), we recommend that a new regulation be adopted setting time limits in the event that one or both parties seek leave to appeal the decision. Specifically, limits should be established regarding the amount of time within which the Pre-Trial Chamber must respond to any requests for leave to appeal and, in the event leave is granted, the timing for the parties to submit briefs to the Appeals Chamber and the issuance of a decision by that chamber.

If adopted, these changes will ensure that a decision by the Pre-Trial Chamber on whether to confirm charges is issued promptly after a suspect's initial appearance and, in the event charges are confirmed, that trial preparations may begin before the Trial Chamber in a timely manner.

I. INTRODUCTION

Article 61 of the Rome Statute establishing the International Criminal Court (ICC) creates a process unique among international criminal bodies: the confirmation of charges process. Specifically, the article provides that a Pre-Trial Chamber of the ICC shall hold “a hearing to confirm the charges on which the Prosecutor intends to seek trial” within a “reasonable time” after a suspect’s¹ surrender to or voluntary appearance before the Court.² The Pre-Trial Chamber may confirm only those charges for which the Prosecutor has presented “sufficient evidence” to establish “substantial grounds to believe” that the person bears responsibility for the charged crime.³

As discussed below, the confirmation process as envisioned by Article 61 was intended to achieve several goals, including ensuring prosecutorial fairness and efficiency, protecting the rights of the suspect, and promoting judicial economy. However, as evidenced in the detailed review below of the twelve confirmation hearings held to date, in practice, the process has fallen far short of achieving these goals. At the same time, it has added significant time to the overall length of trials before the ICC and resulted in lengthy decisions assessing the charges against the suspect in detail, raising questions as to whether the process is consistent with right to a speedy trial and the right to be presumed innocent until a finding of guilt beyond a reasonable doubt.⁴ This report seeks to identify the problematic

¹ Although the Rome Statute refers to an individual who is the subject of an arrest warrant or summons to appear as “the person” or “the person charged” until charges are confirmed against that individual, we use the term “suspect” for ease of readability.

² Rome Statute of the International Criminal Court, *adopted on* 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* 1 July 2002, U.N. Doc. A/CONF.183/9, Art. 61(1) (1998).

³ *Id.* Art. 61(7).

⁴ These rights are guaranteed to an “accused” under Article 67 the Rome Statute, and thus unquestionably apply to any person against whom charges are confirmed at the ICC, but also attach more generally to anyone charged with a criminal offense under the International Covenant on Civil and Political Rights. *See* Rome Statute, *supra* n. 2, Art. 67; International Covenant on Civil and Political Rights, *entry into force* 23 March 1976, Arts. 9(3), 14(2). The Rome Statute expressly authorizes the Court to apply “where appropriate, applicable treaties and the principles and rules of

aspects of the confirmation process as it has played out over the past decade and ultimately recommends a dramatic restructuring of that process in order to more closely align the realities of confirmation with its intended goals and with the right of the accused to a speedy trial and the presumption of innocence.

international law” and states that “[t]he application and interpretation of law... must be consistent with internationally recognized human rights...” Rome Statute, *supra* n. 2, Art. 21.

II. THE CONFIRMATION OF CHARGES PROCESS AS ENVISIONED IN THE DOCUMENTS GOVERNING THE INTERNATIONAL CRIMINAL COURT

A. Text and Drafting History

As stated above, Article 61 of the Rome Statute provides that a Pre-Trial Chamber of the Court “shall” hold “a hearing to confirm the charges on which the Prosecutor intends to seek trial” within a “reasonable time” after a suspect’s surrender to or voluntary appearance before the Court.⁵ The provision further states that, prior to the hearing, the suspect shall be: (i) “provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial;” and (ii) “informed of the evidence on which the Prosecutor intends to rely at the hearing.”⁶ Towards achieving the latter, the Pre-Trial Chamber is empowered to “issue orders regarding the disclosure of information” prior to the hearing.⁷ In the course of the hearing on the confirmation of charges, “the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.”⁸ In putting on its case, the Prosecution may “rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.”⁹ In response, the suspect may: (i) object to the charges; (ii) challenge the evidence presented by the Prosecutor; and (iii) present evidence of his or her own.¹⁰

Finally, Article 61 states that the “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,”¹¹ and, based on this determination, it “shall” do one of the following:

⁵ Rome Statute, *supra* n. 2, Art. 61(1).

⁶ *Id.* Art. 61(3).

⁷ *Id.* Art. 61(2).

⁸ *Id.* Art. 61(5).

⁹ *Id.*

¹⁰ *Id.* Art. 61(6).

¹¹ *Id.* Art. 61(7).

- (i) confirm the charges and commit the suspect to trial on those charges;
- (ii) decline to confirm the charges; or
- (iii) adjourn the hearing and request the Prosecutor to consider providing further evidence on a particular charge or amending a charge.¹²

As discussed at length in a report published by the War Crimes Research Office in October 2008 entitled “The Confirmation of Charges Process at the International Criminal Court,” Article 61 was the product of negotiations between countries that favored the type of indictment review process used by the International Criminal Tribunal for the former Yugoslavia (ICTY) and those that sought the creation of an “investigating chamber.”¹³ Under the “indictment review” approach, embodied in the 1994 Draft Statute created by the International Law Commission, a case would proceed to trial before the ICC upon a determination by the Presidency of the Court that a *prima facie* case existed under the terms of the Statute.¹⁴ This determination would be made solely on the basis of an indictment and supporting documents supplied by the Prosecutor; there would be no opportunity for the suspect to challenge the case before it went to trial.¹⁵ In response to this proposal, several countries advocated for some type of pre-trial chamber with authority to deal with “preliminary investigations,” “indictments,” or “pre-trial matters.”¹⁶ In

¹² *Id.*

¹³ See War Crimes Research Office, *The Confirmation of Charges Process at the International Criminal Court*, at 44-62 (October 2008), <https://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonConfirmationofCharges.pdf>.

¹⁴ Draft Statute for an International Criminal Court, Report of the ILC on the work of its forty-sixth session (2 May-22 July 1994), vol. II, 2 May - 22 July 1994, A/CN.4/SER.A/1994/Add.1 (Part 2), Arts. 26 and 27.

¹⁵ *Id.*

¹⁶ Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. II (Compilation of Proposals), U.N. Doc. A/51/22, at 8 (1996) (noting that France had called for the creation of preliminary investigations chambers and the Netherlands had called for creation of an investigative judge); *id.* at 21 (explaining that France had proposed that a preliminary investigations chamber would “perform pre-trial functions”); *id.* at 24 (relaying Austria’s call for the President to establish an “Indictment Chamber”); *id.* at 25 (noting that delegations

particular, France proposed a “Preliminary Investigations Chambers” with the power to amend the indictment *sua sponte* and ultimately frame the case against the suspect.¹⁷ Importantly, under the French proposal, the suspect would receive a copy of the proposed indictment and the supporting evidence prior to the preliminary chamber’s review and would have the opportunity to challenge the case before it was confirmed.¹⁸

While there was substantial support for the creation of a pre-trial chamber, such proposals also “raised concerns among those delegations who feared excessive judicial interference at such an early stage would undermine the independence of the Prosecutor.”¹⁹ Additionally, while the concept of a public confirmation “hearing” was seen as beneficial to the extent that it would afford the suspect with greater protection,²⁰ states also thought it was critical that the confirmation of the indictment “in no way to be seen as a pre-judgment by the court as to the actual guilt or innocence of the accused.”²¹ Consistent with this concern, the proposals regarding the appropriate level of information to be provided to the suspect prior to confirmation made clear that the “full presentation of witnesses and

from Algeria, Egypt, Jordan, Kuwait, Libyan Arab Jamahiriya, and Qatar had called for the creation of Chamber on indictments and preliminary matters); *id.* at 26 (referring to Switzerland’s call for an “Indictment Chamber”); *id.* at 120-21 (proposing to transfer responsibility of pre-trial functions to an Indictment Chamber/Preliminary Investigations Chamber and allow the Presidency/Indictment Chamber to require the Prosecutor to present additional material in support of any count).

¹⁷ Draft Statute of the International Criminal Court: Working Paper Submitted by France to the Preparatory Committee on the Establishment of an ICC, A/AC.249/L.3, Art. 10, 6 August 1996. *See also id.* Art. 48(5) (“Following the hearing and after deliberations, the Preliminary Investigations Chamber may: Confirm the indictment in its entirety; Confirm only part of the indictment and amend it, either by declaring the case inadmissible in part, for the reasons listed in article 35, if the Court has not already ruled on this issue, or by withdrawing certain charges deemed not sufficiently serious, or by giving some facts another characterization, in accordance with articles 27 to 32; Refuse to confirm the indictment.”).

¹⁸ Working Paper by France, *supra* n. 17, Art. 48.

¹⁹ Fabricio Guariglia, *Article 56*, in COMMENTARY ON THE ROME STATUTE ON THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 736, 737 (Otto Triffterer ed. 1999).

²⁰ *Id.*

²¹ 1994 Draft Statute, *supra* n. 14, Art. 27 Commentary, ¶ 4.

evidence as at trial [was] not contemplated”²² and that the Prosecutor should be authorized to rely on summary evidence.²³

Ultimately, the Pre-Trial Chamber was created under the Rome Statute, although the powers afforded to it are not as extensive as some countries would have liked, given that it has no authority to amend the charges as prepared by the Prosecutor.²⁴ Furthermore, nothing in the Rome Statute or the subsequently adopted Rules of Procedure and Evidence mandates any disclosure to the suspect prior to the confirmation hearing beyond the evidence to be relied upon by the Prosecution at the hearing. Notably, France proposed that the Rules mandate that all disclosure take place prior to confirmation, saying that “the Pre-Trial Chamber, during the pre-trial phase, should settle such matters, so that the trial itself is not disrupted by problems related to disclosure.”²⁵ As one of the French delegates to the Preparatory Commission explained: “it would be a waste of time to have just a partial disclosure at the pre-trial stage and then still disputes at the trial stage.”²⁶ Yet others were of the opinion that “at this stage of the

²² Paper put forward by the Delegations of Argentina, Australia, Austria, Canada, France, Germany, Japan, Korea, Malawi, the Netherlands, South Africa, Sweden, the United Kingdom, and the United States, proposing a framework for the fundamental stages of the criminal process of the Court to the Working Group on Procedural Matters, U.N. Doc. A/AC.249/1998/WG.4/DP.36, at 2, 27 March 1998.

²³ *Id.*

²⁴ See Rome Statute, *supra* n. 2, Art. 61(7). See also, e.g., Michela Miraglia, *The First Decision of the ICC Pre-Trial Chamber*, 4 J. Int’l Crim. Just. 188, 190 (2006) (“The way in which the [ICC pre-trial] process is a compromise between different proposals brought into negotiations by the delegates represents a novel solution compared with the ones adopted in the traditional procedural models: Pre-trial Chambers are to act as an organ of judicial scrutiny and review, not as an investigating judge.”); Jérôme de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?*, 5 J. Int’l Crim. Just. 402, 404 (May 2007) (noting that the ICC Pre-Trial Chamber “is not an investigating chamber in the proper sense,” as it “has only limited power to conduct investigations and oversee the prosecutor’s activities”); David Scheffer, *A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence*, 21 Leiden J. Int’l Law 151, 153 (2008) (explaining that the Pre-Trial Chamber was not designed to “become the investigatory engine of the Court,” in part because this “would have tilted the ICC too far in the direction of the type of civil law court that relies heavily on the role of an investigating judge and minimizes the prosecutor’s functions”).

²⁵ Proposal by France, *General Outline of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/1999/DP.2, ¶ 10, 1 February 1999.

²⁶ Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 3 J. Int’l Crim. Just. 603, 610 (December 2003).

proceedings it is unnecessary for the Pre-Trial Chamber to undertake the more detailed disclosure exercise that will be necessary before the trial,” noting that “such a process is likely to be time-consuming and may delay the straightforward task of determining whether there is sufficient evidence to support the prosecution charges.”²⁷ The latter view ultimately prevailed, as Article 61(3) of the Rome Statute merely states that the Pre-Trial Chamber “*may* issue orders regarding the disclosure of information for the purposes of the hearing.”²⁸ Furthermore, disclosure is discussed in general terms in the final version of the Rules,²⁹ implying that the drafters did not intend for disclosure to be handled exclusively at the pre-trial stage. Finally, there is no requirement that any particular level of disclosure be completed prior to the confirmation hearing other than Rule 77, which requires the Prosecution to allow the Defense to inspect “any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are ... intended for use by the Prosecutor as evidence for the purposes of the *confirmation hearing* or at trial...”³⁰

²⁷ *Id.* (quoting Peter Lewis, a British delegate to the Preparatory Commission).

²⁸ Rome Statute, *supra* n. 2, Art. 61(3) (emphasis added).

²⁹ *See generally* International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, *entered into force* 9 September 2002, R. 76 – 84 (rules governing disclosure).

³⁰ *Id.* R. 77 (emphasis added). While Rule 77 also outlines the right of the Defense to inspect evidence in the possession or control of the Prosecutor “which [is] material to the preparation of the defense,” it does not state that such inspection must be complete prior to confirmation. *Id.* Other relevant rules include Rule 76, which requires that the Prosecution disclose “the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses,” is simply entitled “pre-trial disclosure relating to prosecution witnesses” and contains no requirement that the Prosecution disclose the identities of all witnesses it plans to use at *trial* prior to the confirmation hearing. *Id.* R. 76(1). Similarly, Rule 81(4), which sets forth the procedure by which the Prosecution may seek permission to withhold certain evidence – such as confidential information or information that may put a victim or witness at risk if disclosed – states that the Prosecution must obtain authorization from “the Chamber,” without specifying the Pre-Trial Chamber or the Trial Chamber. *Id.* R. 81(4). Finally, Rule 121, which governs “[p]roceedings before the confirmation hearing,” states that “[i]n accordance with [Article 61(3)], the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued.” *Id.* R. 121(3). As noted above, however, Article 61(3) itself does not require any particular level of disclosure prior to the confirmation hearing. *See supra* n. 28 and accompanying text.

B. The Goals of the Confirmation Process

From the drafting history, it appears that Article 61 was initially adopted with two distinct goals in mind. First, the confirmation of charges process was created as check against the Prosecutor's authority to determine the appropriate charges in a case.³¹ By vesting the Presidency – and then later the Pre-Trial Chamber – with the authority to review the indictment against the suspect, the Chambers would be able to ensure prosecutorial fairness and effectiveness in investigations.³² Second, the confirmation of charges process was created to protect the rights of the suspect, as it would allow a suspect to challenge the charges before proceeding to trial.³³ At the same time, however, the drafters agreed that the confirmation of charges hearing was not intended to be a “mini-trial,” as they wanted to avoid allowing the confirmation process to become a pre-judgment of the suspect.³⁴ Indeed, given the low standard applied at the confirmation stage, subsequent Pre-Trial Chambers have made clear that the purpose of

³¹ See, e.g., Kai Ambos & Dennis Miller, *Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective*, 7 Int'l Crim. L. Rev. 335, 341 (2007) (claiming that the “primary function of the confirmation procedure is to check and balance the Prosecutor”) (emphasis in original).

³² International Commission of Jurists, *The International Criminal Court: Third ICJ Position Paper*, Ch. VI.A.1(c), August 1995.

³³ War Crimes Research Office, *The Confirmation of Charges Process at the International Criminal Court*, *supra* n. 13, at 25, 45, 48-50, 60, 64. See also *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, ¶ 37 (Pre-Trial Chamber I, 29 January 2007); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 28 (Pre-Trial Chamber II, 15 June 2009); *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, ¶ 39 (Pre-Trial Chamber I, 8 February 2010); *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, ¶ 52 (Pre-Trial Chamber II, 23 January 2012); *The Prosecutor v. William Samoei Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, ¶ 40 (Pre-Trial Chamber II, 23 January 2012). See also 1994 Draft Statute, *supra* n. 14, Art. 27 Commentary, ¶ 3 (emphasizing the Court respecting a suspect's right to a fair and speedy trial, as guaranteed under the International Covenant on Civil and Political Rights).

³⁴ 1994 Draft Statute, *supra* n. 14, Art. 27 Commentary, ¶ 4.

Article 61 is simply to protect the suspect from “*wrongful and wholly unfounded charges*.”³⁵

While not explicit in the drafting history of the Rome Statute, judges of the ICC and commentators have repeatedly stressed a third rationale for the confirmation of charges process: judicial economy. Thus, for instance, ICC Judge Claude Jorda, who wrote the first confirmation decision delivered by the Court, explained: “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 [suspect], in full equality, to be tried without undue delay.”³⁶ Similarly, in the context of the *Bemba* case, the Trial Chamber observed that “the role of Pre-Trial Chambers is to prepare the case for trial.”³⁷ Likewise, an academic analysis of the “structure and function” of the confirmation process concluded: “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.”³⁸

³⁵ See, e.g., *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 33, ¶ 37 (emphasis added); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, ¶ 63 (Pre-Trial Chamber I, 30 Sept 2008) (emphasis added).

³⁶ Claude Jorda & Marianne Saracco, *The Reasons d’être of the Pre-Trial Chamber of the International Criminal Court*, in FROM HUMAN RIGHTS TO INTERNATIONAL CRIMINAL LAW: STUDIES IN HONOUR OF AN AFRICAN JURIST, THE LATE JUDGE LAITY KAMA 430 (Emmanuel Decaux, *et al.*, eds. 2007).

³⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Admission Into Evidence of Materials Contained in the Prosecution’s List of Evidence, ICC-01/05-01/08-1022, ¶ 27 (Trial Chamber III, 19 November 2010). See also *The Prosecutor v. Laurent Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, Dissenting Opinion of Judge Sylvia Fernández de Grumendi, ¶¶ 21, 26 (Pre-Trial Chamber I, 3 June 2013) (referring to the “judicial efficiency that Pre-Trial Chambers are called to ensure”).

³⁸ Ambos & Miller, *supra* n. 31, at 347-48.

III. THE CONFIRMATION OF CHARGES PROCESS IN PRACTICE

A. Overview

As of the time of writing, the Court has completed twelve confirmation of charges proceedings for twenty-one suspects, each of which is summarized below. Generally, the process has taken multiple months from a suspect's initial appearance to the release of a decision regarding whether the case will be sent to trial. The shortest amount of time between a suspect's initial appearance and a decision on whether to confirm the charges was seven months and nineteen days,³⁹ and the longest period was two years, six months, and eight days.⁴⁰ However, the delay a suspect faces to actually get to trial does not end once the decision confirming charges is issued, as both the Defense and the Prosecution can file a request for leave to appeal the decision.⁴¹ Following a decision by the Pre-Trial Chamber on this request, and, if granted, a decision by the Appeals Chamber, the Presidency must constitute a Trial Chamber to handle the case, which has taken up to three months.⁴²

Figure One below summarizes the amount of time between a suspect's first appearance before the ICC and the Presidency's decision constituting a Trial Chamber for those cases in which charges have been confirmed.

³⁹ See *infra* n. 408 *et seq.* and accompanying text (describing the confirmation proceedings against Charles Blé Goudé).

⁴⁰ See *infra* n. 343 *et seq.* and accompanying text (describing the confirmation proceedings against Laurent Gbagbo).

⁴¹ See generally ICC Rules, *supra* n. 29, R. 155(1) (requiring permission from the Pre-Trial Chamber to appeal a decision issued under Rome Statute Article 82(1)(d) or 82(2)).

⁴² See, e.g., *The Prosecutor v. Laurent Gbagbo*, Decision re-constituting Trial Chamber I and referring to it the case of *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-682 (The Presidency, 17 September 2014).

FIGURE ONE: Length of Confirmation Process⁴³

Case	Time Between Suspect's First Appearance and Presidency's Decision Constituting a Trial Chamber
<i>Lubanga</i>	> 11 months
<i>Katanga & Ngudjolo</i>	> 12 months > 7 months
<i>Bemba</i>	> 14 months
<i>Banda & Jerbo</i>	> 8 months
<i>Ruto, et al.</i>	> 11 months
<i>Kenyatta, et al.</i>	> 11 months
<i>Ntaganda</i>	> 15 months
<i>Gbagbo</i>	> 33 months
<i>Bemba, et al.</i>	Between > 14 months and > 10 months
<i>Blé Goudé</i>	> 8 months

Finally, the Trial Chamber can begin to set a date for trial, although, as discussed below, the actual start of trial is frequently delayed by issues

⁴³ For the dates of each suspect's first appearance before the ICC, the Pre-Trial Chamber's decision on whether to confirm the charges against that suspect, and the Presidency's decision constituting a Trial Chamber, together with relevant citations, see Annex One. Note that the *Abu Garda* and *Mbarushimana* cases are not included in Figure One because, as explained in detail below, the charges were not confirmed and thus no Trial Chamber was ever constituted. However, as seen in Annex One, the confirmation process in those cases was equally lengthy. Specifically, in the *Abu Garda* case, more than eight months passed between the suspect's first appearance and the decision declining to confirm any charges, whereas the process took eleven months in the *Mbarushimana* case. *Id.*

such as those relating to disclosure, translations, witness security, *etc.* Issues regarding the precise nature of the charges against the accused have also persisted well into the trial stage and, in those few cases that have reached final judgment at trial, on appeal. Figure Two summarizes the amount of time between the Presidency's decision constituting a Trial Chamber and the first day of trial for those cases that have actually proceeded to trial at the time of this writing.

FIGURE TWO: Length of Post-Confirmation, Pre-Trial Phase⁴⁴

Case	Time Between Constitution of Trial Chamber and First Day of Trial
<i>Lubanga</i>	> 22 months
<i>Katanga & Ngudjolo</i>	13 months
<i>Bemba</i>	> 14 months
<i>Ruto, et al.</i>	> 17 months
<i>Ntaganda</i>	> 13 months

Figure Three combines the dates in the first two figures to show the amount of time between a suspect's first appearance before the Court and the first day of trial for those cases that have proceeded to trial at the time of this writing.

⁴⁴ For the dates of the Presidency's decision constituting a Trial Chamber in each case and the first day of trial, together with relevant citations, *see* Annex Two.

FIGURE THREE: Overall Length of Pre-Trial Phase⁴⁵

Case	Time Between Suspect's First Appearance and First Day of Trial
<i>Lubanga</i>	> 24 months
<i>Katanga & Ngudjolo</i>	> 25 months > 20 months
<i>Bemba</i>	> 28 months
<i>Ruto, et al.</i>	> 29 months
<i>Ntaganda</i>	> 29 months

B. The Prosecutor v. Thomas Lubanga Dyilo

Thomas Lubanga Dyilo, the first suspect to be taken into the custody of the International Criminal Court, was surrendered to the ICC on 17 March 2006.⁴⁶ Mr. Lubanga, whose case arose from the situation in the Democratic Republic of Congo (DRC), was arrested pursuant to a finding by Pre-Trial Chamber I that there were reasonable grounds to believe he was criminally responsible for the war crime of conscripting, enlisting, and using children to participate actively in the course of armed conflict, as leader of the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo*.⁴⁷ Shortly after Mr. Lubanga's transfer to the ICC, the Pre-Trial Chamber scheduled the confirmation of charges hearing for 27 June 2006, leaving the parties more than three months to prepare.⁴⁸ The Chamber

⁴⁵ For the dates of each suspect's first appearance before the ICC and the first day of trial, together with relevant citations, see Annex Three.

⁴⁶ See *The Prosecutor v. Thomas Lubanga Dyilo*, Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-38 (Pre-Trial Chamber I, 17 March 2006).

⁴⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, ICC-01/04-01/06-2, at 4 (Pre-Trial Chamber I, 10 February 2006).

⁴⁸ See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defense on the System of Disclosure

then appointed Judge Sylvia Steiner to serve as a Single Judge of Pre-Trial Chamber I for purposes of overseeing preparations for the confirmation of charges hearing, including taking the necessary decisions regarding disclosure between the Prosecution and the Defense.⁴⁹

1. *The Confirmation Process*

One of the first decisions issued by Judge Steiner was one setting forth a “system of disclosure” for the parties,⁵⁰ which included the following principles:

- The Prosecution was required to provide the Defense with the names and statements of all witnesses on which it intended to rely at the confirmation hearing, “regardless of whether the Prosecution intend[ed] to call them to testify or to rely on their redacted statements, non-redacted statements, or a written summary of the evidence contained in those statements.”⁵¹
- As a “general rule,” witness statements, transcripts of interviews with witnesses, and notes from witness interviews had to be disclosed to the Defense “in full;” any restriction on such disclosure had to “be authorised by the single judge.”⁵²
- All exculpatory material⁵³ was to be disclosed by the Prosecution “as soon as practicable.”⁵⁴

and Establishing an Interim System of Disclosure, ICC-01/04-01/06-54, at 2 (Pre-Trial Chamber I, 23 March 2006).

⁴⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Designating a Single Judge in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-51 (Pre-Trial Chamber I, 22 March 2006). Article 39(2)(b)(iii) provides that the “functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence.” Rome Statute, *supra* n. 2, Art. 39(2)(b)(iii).

⁵⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, at 2-4 (Pre-Trial Chamber I, 15 May 2006).

⁵¹ *Id.* Annex 1, ¶¶ 93-100.

⁵² *Id.* Annex 1, ¶ 101.

⁵³ Two provisions govern the disclosure of exculpatory material in cases before the ICC. The first is Article 67(2) of the Rome Statute, which states that, “[i]n addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as

- The parties need only share with the Pre-Trial Chamber the evidence upon which they intended to rely at the confirmation hearing.⁵⁵

Judge Steiner's first decision also set forth a timetable according to which the parties would make all required disclosures well in advance of the scheduled 27 June 2006 confirmation hearing.⁵⁶

After setting forth the general system of disclosure, Judge Steiner issued a second decision, detailing some of the principles governing applications to restrict disclosure.⁵⁷ Judge Steiner noted that, in ascertaining the relevant principles, particular attention must be paid to "the limited scope of the confirmation hearing" and to "the fact that protection of sensitive evidence, materials, and information must be consistent with the rights of the Defense."⁵⁸ Furthermore, in view of the Article 67(2) requirement that all potentially exculpatory evidence in the possession of the Prosecution be disclosed to the Defense "as soon as practicable," the judge held that she would not authorize any redactions to "potentially exculpatory excerpts" of statements made by witnesses upon whom the Prosecution intended to rely.⁵⁹

Despite Judge Steiner's detailed disclosure timeline, it was quickly apparent the Prosecution would be unable to comply with the

practicable, disclose to the defense evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." Rome Statute, *supra* n. 2, Art. 67(2). The second is Rule 77, which provides that the Prosecutor "shall, subject to the restrictions on disclosure as provided for in the Statute and in [R]ules 81 and 82, permit the defense to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defense or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person." ICC Rules, *supra* n.29, R. 77.

⁵⁴ *Lubanga*, Decision on the Final System of Disclosure and the Establishing of a Timetable, *supra* n. 50, Annex 1, ¶¶ 121-25.

⁵⁵ *Id.* ¶¶ 41-43.

⁵⁶ *Id.* at 8-13.

⁵⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, ICC-01/04-01/06-108-Corr (Pre-Trial Chamber I, 19 May 2006).

⁵⁸ *Id.* ¶ 6.

⁵⁹ *Id.* ¶¶ 36-38.

disclosure deadlines necessary to commence the confirmation hearing as scheduled on 27 June 2006. Specifically, the delays arose because the Prosecution was seeking protective measures for “a number” of the witnesses upon whom it intended to rely at the confirmation hearing, and the process under which the Victims and Witnesses Unit (VWU) granted such protective measures took approximately three months from the time the Prosecution submitted the request.⁶⁰ Thus, on 24 May 2006, the Single Judge postponed the confirmation hearing from 27 June to 28 September 2006 and adjusted the timeline for disclosures accordingly.⁶¹

Under the new timetable, Judge Steiner ordered the Prosecution to file any requests for redactions by 29 August, suggesting the confirmation hearing would go forward as planned on 28 September 2006.⁶² However, on 20 September, Judge Steiner was forced once again to postpone the hearing, noting that the Prosecution had submitted applications as late as 19 September 2006, and therefore “part of the evidence on which the Prosecutor intends to rely at the confirmation hearing is not yet accessible to the [D]efence.”⁶³ Eventually, the hearing was rescheduled for 9 November 2006 – more than four months after the initial date of the hearing, and nearly nine months after Mr. Lubanga was transferred to ICC custody.⁶⁴

The confirmation of charges hearing finally commenced on 9 November 2006.⁶⁵ The hearing lasted approximately two weeks, closing on 28 November 2006.⁶⁶ Following the hearing, the parties and

⁶⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision on the Final System of Disclosure, ICC-01/04-01/06-126, at 4-5 (Pre-Trial Chamber I, 24 May 2006).

⁶¹ *Id.*

⁶² *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution Practice to Provide to the Defense Redacted Versions of Evidence and Materials Without Authorisation by the Chamber, ICC-01/04-01/06-355, at 4-5 (Pre-Trial Chamber I, 25 August 2006).

⁶³ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Postponement of the Confirmation Hearing, ICC-01/04-01/06-454, at 2-3 (Pre-Trial Chamber I, 20 September 2006).

⁶⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Date of the Confirmation Hearing, ICC-01/04-01/06-521, at 4 (Pre-Trial Chamber I, 5 October 2006).

⁶⁵ *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 33, ¶ 30.

⁶⁶ *Id.*

participating victims were granted the opportunity to submit post-hearing briefs.⁶⁷ On 29 January 2007, the Chamber issued its decision confirming the charges against Mr. Lubanga.⁶⁸ In its decision, the Chamber stressed that the confirmation process was “limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought,” thus avoiding trial on “wrongful and wholly unfounded charges.”⁶⁹ It found that this threshold had been met in this case.⁷⁰

The case against Mr. Lubanga was technically referred to Trial Chamber I on 6 March 2007; nearly one year after the suspect was first taken into custody by the ICC.⁷¹ However, the Prosecution and Defense both requested leave to appeal the confirmation of charges decision, with responses by the Legal Representatives of Victims, and the Pre-Trial Chamber did not issue its decision rejecting these requests until 24 May 2007.⁷² Thus, Mr. Lubanga’s case was finally able to clear pre-trial proceedings over one year and two months after the suspect initially appeared at the ICC.

2. *Post-Confirmation, Pre-Trial Delays*

Despite the case being assigned to Trial Chamber I on 6 March 2007, a vast array of issues remained to be resolved before the trial could commence. Indeed, one year after the confirmation hearing had begun, on 9 November 2007, the Trial Chamber issued a decision noting that the Prosecution had only disclosed a fraction of the exculpatory documents in its possession to the Defense and had only identified eleven of thirty-seven witnesses it was planning to call at trial.⁷³

⁶⁷ *Id.* at ¶ 31.

⁶⁸ See generally *id.*

⁶⁹ *Id.* ¶ 37.

⁷⁰ *Id.*

⁷¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Constituting Trial Chamber I and Referring to It the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01-04-01-06-842 (Presidency, 6 March 2007).

⁷² *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defense Applications for Leave to Appeal the Decision on the Confirmation of Charges, ICC-01/04-01/06-915 (Pre-Trial Chamber I, 24 May 2007).

⁷³ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ICC-01/04-01/06-1019, ¶¶ 2-7 (Trial Chamber I, 9 November 2007). See also *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defense’s Preparation for the

Ultimately, the failure of the Prosecutor to disclose exculpatory material led the Trial Chamber to stay the proceedings for more than five months, causing a significant delay in proceedings.⁷⁴ Moreover, the Trial Chamber held that evidence admitted before the Pre-Trial Chamber at the confirmation of charges hearing would not be automatically entered into evidence for purposes of trial, but must be introduced *de novo*, meaning any evidentiary disputes would have to be re-litigated.⁷⁵

Another issue that arose prior to the start of trial related to the nature of the charges. Specifically, although the Prosecutor had charged Mr. Lubanga with committing war crimes in *non-international* armed conflict under Article 8(2)(e)(vii) of the Rome Statute,⁷⁶ the Pre-Trial Chamber held that Mr. Lubanga should be tried, in part, for committing the war crime of conscripting, enlisting, and using children to participate actively in *international* armed conflict under Article 8(2)(b)(xxvi).⁷⁷ Notably, the Prosecution had expressly addressed its decision to limit the charges to the context of non-international armed

Confirmation Hearing, ICC-01/04-01/07-621, ¶ 45 (Pre-Trial Chamber I, 20 June 2008) (“The Single Judge [Steiner] recalls that, at the time of completion of her duties as Single Judge in the *Lubanga* Case on 5 October 2006, the Prosecution had only identified twenty-nine [A]rticle 54(3)(e) documents as potentially exculpatory or otherwise material to the Defense. As consent had already been secured in relation to sixteen of such documents, and hundreds of documents falling under [A]rticle 67(2) and [R]ule 77 had already been disclosed to the Defense by that time, Judge Claude Jorda, acting as Single Judge of the Chamber, found that the applicable standard at the confirmation hearing encapsulated in the so-called ‘bulk rule’ had been met. As a result, the Single Judge is surprised to learn that after the confirmation hearing in the *Lubanga* Case, the number of [A]rticle 54(3)(e) documents identified as potentially exculpatory or material to the Defense rose, in fact, into the hundreds.”).

⁷⁴ See War Crimes Research Office, *The Relationship Between the International Criminal Court and the United Nations*, at 45-50 (August 2009), https://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_on_ICC_and_UN_August2009.pdf.

⁷⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, 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, ¶¶ 4-8 (Trial Chamber I, 13 December 2007).

⁷⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Submission of the Document Containing the Charges Pursuant to Article 61(3)(a) and of the List of Evidence Pursuant to Rule 121(3), ICC-01/04-01/06-356, ¶ 12(i) (Office of the Prosecutor, 28 August 2006)

⁷⁷ *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 33, at 156.

conflict in its Document Containing the Charges, saying that although there was some evidence of foreign state support of militias within the DRC, that evidence did “not suffice to enable the Prosecution to meet its burden of establishing an international armed conflict as the term is defined by international criminal jurisprudence.”⁷⁸ The Prosecution reiterated this point during the actual confirmation hearing,⁷⁹ and it presented no evidence during the hearing in support of a charge against Mr. Lubanga for committing war crimes in the context of an international armed conflict. Nevertheless, the Pre-Trial Chamber included the charge in its decision. Subsequently, the Trial Chamber determined that it possessed no authority to review the Pre-Trial Chamber’s decision to amend the legal characterization of the charges against Mr. Lubanga.⁸⁰ Specifically, it held that, although the Trial Chamber may modify the legal characterization of the facts under Regulation 55 of the Court’s Regulations,⁸¹ it could not exercise that authority until the trial had begun and evidence had been presented.⁸² Thus, the Trial Chamber concluded that the Prosecutor should be prepared to present, and the Defense should be in a position to address, all available evidence on the issue of whether the relevant conduct

⁷⁸ *Lubanga*, Submission of the Document Containing the Charges Pursuant to Article 61(3)(a) and of the List of Evidence Pursuant to Rule 121(3), *supra* n. 76, ¶ 12(i) (citing *The Prosecutor v. Dusko Tadić*, Judgment, ¶¶ 68-171 (International Criminal Tribunal for the former Yugoslavia Appeals Chamber, 15 July 1999)).

⁷⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Open Session, ICC-01/04-01/06-T-33-EN, at 96: 12-23 (Transcript, 13 November 2006).

⁸⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, 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, ¶¶ 39-50 (Trial Chamber I, 13 December 2007).

⁸¹ Regulation 55 of the Regulations of the Court is a provision that permits a Trial Chamber to convict an accused of a crime other than that with which he was originally charged by the Prosecution, or to base its conviction on a different mode of liability than originally charged, subject to certain conditions. *See* International Criminal Court, Regulations of the Court, ICC-BD/01-01-04, Reg. 55, *adopted* 26 May 2004. In particular, the re-characterization will only be permitted if it does not exceed the facts and circumstances described in the charges as confirmed by the Court’s Pre-Trial Chamber. *See The Prosecutor v. Thomas Lubanga Dyilo*, Open Session, ICC-01/04-01/06-T-33-EN, at 96: 12-23 (Transcript, 13 November 2006).

⁸² *Lubanga*, 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, *supra* n. 80, ¶¶ 47-48.

took place in the context of international *or* non-international armed conflict.⁸³

Given several of the issues presented above, as well as others not discussed in this report, Mr. Lubanga's trial did not commence until 26 January 2009.⁸⁴ Thus, Mr. Lubanga sat in ICC detention for almost three years between his initial appearance and his trial actually beginning, with almost two full years to the day elapsing between the confirmation decision and the start of Mr. Lubanga's trial.

3. *Ongoing Litigation Over the Nature of the Charges*

On 22 May 2009, while the Prosecution was still presenting its case before the Trial Chamber, the Legal Representatives of Victims requested that the Chamber invoke Regulation 55 to apply "an additional legal characterization" to the facts and circumstances of the charges confirmed against the suspect.⁸⁵ In particular, the victims' application argued that the Trial Chamber should "re-characterize" the charges against Mr. Lubanga to include the crime against humanity of sexual slavery and the war crimes of sexual slavery and cruel and/or inhuman treatment.⁸⁶ According to the victims, these charges could properly be added under the Trial Chamber's authority under Regulation 55 to "change the legal characterisation of the facts" because, in the view of the victims, the proposed additional charges fell within the context of the facts and circumstances described in the charges against Mr. Lubanga as confirmed by the Pre-Trial Chamber.⁸⁷

In a decision issued 14 July 2009, the same day that the Prosecution finished presenting its evidence in the case, the majority of Trial Chamber I notified the parties that it would consider adding the

⁸³ *Id.* ¶ 50.

⁸⁴ See *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, ¶ 10 (Trial Chamber I, 14 March 2012).

⁸⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure Under Regulation 55 of the *Regulations of the Court*, No. ICC-01/04-01/06-1891-tENG, ¶ 41 (ICC Trial Chamber I, 22 May 2009).

⁸⁶ *Id.* ¶¶ 15, 41.

⁸⁷ See generally *id.*

victims' proposed charges.⁸⁸ In this decision, the Trial Chamber held that it would apply a particular reading of Regulation 55 that would effectively allow it to consider facts and circumstances not described in the charges confirmed by the Pre-Trial Chamber.⁸⁹ The Prosecution and Defense were granted leave to obtain interlocutory review of this interpretation of Regulation 55⁹⁰ and the Trial Chamber suspended the proceedings until the Appeals Chamber could resolve the issue.⁹¹ On 8 December 2009, The Appeals Chamber reversed the Trial Chamber's decision and held that the Trial Chamber cannot re-characterize charges based on facts and circumstance that were not described in the confirmation of charges.⁹² Given the more restricted reading of Regulation 55 mandated by the Appeals Chamber, the Trial Chamber was forced to reject the victims' request for re-characterization, but only after a significant delay in trial proceedings.⁹³

4. Trial Chamber Judgment and Issue of Notice of Charges

Following 204 days of hearings, the presentation of evidence in the *Lubanga* case closed on 20 May 2011⁹⁴ and the Trial Chamber issued its judgment on 14 March 2012, convicting the suspect of three crimes involving children in armed conflict under Article 8(2)(e)(vii) of the Rome Statute.⁹⁵ Significantly, the Trial Chamber reached the conclusion that Mr. Lubanga was guilty beyond a reasonable doubt

⁸⁸ See *Prosecutor v. Thomas Lubanga Dyilo*, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049 (ICC Trial Chamber I, 14 July 2009).

⁸⁹ *Id.* ¶¶ 27-32.

⁹⁰ See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Adjourning the Evidence in the Case and Consideration of Regulation 55, ICC-01/04-01/06-2143, ¶ 10 (ICC Trial Chamber I, 2 October 2009).

⁹¹ *Id.* ¶ 23.

⁹² *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court," ICC-01/04-01/06-2205, ¶ 112 (ICC Appeals Chamber, 8 December 2009).

⁹³ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-2223, ¶ 37 (ICC Trial Chamber I, 8 January 2010).

⁹⁴ *Lubanga*, Judgment Pursuant to Article 74 of the Statute, *supra* n. 84, ¶ 11.

⁹⁵ See generally *id.*

despite having excluded the evidence provided by each of the nine child soldiers relied upon by the Prosecution in its Document Containing the Charges (DCC) to support the allegations against the suspect.⁹⁶ Specifically, the Trial Chamber determined that, although it could not rely on the evidence of any of these nine witnesses, other evidence presented at trial, taken together, satisfied the Chamber of Mr. Lubanga's guilt.⁹⁷

After the issuance of the judgment, Mr. Lubanga filed an appeal arguing, *inter alia*, that he had received insufficient notice of the charges against him, given that the evidence ultimately relied upon by the Trial Chamber was insufficiently detailed in the DCC.⁹⁸ In assessing this claim, the Appeals Chamber first confirmed that, pursuant to Article 67(1) of the Rome Statute, the Prosecutor must provide the suspect with "details as to the date and location of the underlying acts [for which he is charged] and identify the alleged victims to the greatest degree of specificity possible in the circumstances."⁹⁹ However, on the question of "where and how the detailed information about the charges is to be provided to the accused," the Appeals Chamber rejected the notion that such information must be contained in the DCC given to the accused prior to the confirmation hearing.¹⁰⁰ Rather, the Chamber held that, in assessing whether sufficient notice has been provided to the accused, it must consider "all documents that were designed to provide information about the charges," including "auxiliary documents" provided to the accused *after confirmation* but prior to the start of the trial hearing.¹⁰¹ In this case, the Chamber noted that Mr. Lubanga's appeal referred primarily to the initial Document Containing the Charges submitted by the Prosecution, with some cursory references to the Pre-Trial Chamber's Decision on the Confirmation of Charges, but did not refer to details included in the Amended Document Containing the Charges and Summary of Evidence submitted by the Prosecution

⁹⁶ *Id.* ¶ 480.

⁹⁷ See generally *id.*

⁹⁸ International Criminal Court, Public Redacted Judgment on the Appeal of Mr Thomas Lubanga Dyilo against His Conviction, ICC-01/04-01/06-3121-Red, ¶ 131 (Appeals Chamber, 1 December 2014) ("Mr Lubanga argues that he was informed of those underlying criminal acts, except for those in relation to the nine named child soldiers, in insufficient detail.").

⁹⁹ *Id.* ¶ 123.

¹⁰⁰ *Id.* ¶ 124.

¹⁰¹ *Id.* ¶¶ 128-29.

to the Trial Chamber prior to the start of trial.¹⁰² The Appeals Chamber held that Mr. Lubanga “should have substantiated his submissions by reference to these latter documents” and declined to “conduct *proprio motu* an exhaustive review of the charging documents and relate the information contained therein to the findings” of the Trial Chamber in its judgment.¹⁰³ Accordingly, a majority of the Appeals Chamber, Judge Anika Ušacka dissenting, dismissed the ground of appeal.¹⁰⁴ It likewise dismissed Mr. Lubanga’s other grounds of appeal and affirmed the Trial Chamber’s conviction.¹⁰⁵

C. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

Approximately four months after the *Lubanga* case was referred to the Trial Chamber, in July 2007, Pre-Trial Chamber I authorized the issuance of an arrest warrant for a second suspect identified in the context of the situation in the DRC, Germain Katanga.¹⁰⁶ The Chamber found reasonable grounds to believe that Mr. Katanga was criminally responsible for a range of war crimes and crimes against humanity, including crimes involving sexual slavery and murder.¹⁰⁷ As discussed further below,¹⁰⁸ the case against Mr. Katanga was eventually joined with the one against Mathieu Ngudjolo Chui, who

¹⁰² *Id.* ¶ 133.

¹⁰³ *Id.* ¶ 134.

¹⁰⁴ *See generally id.* In her dissenting opinion, Judge Ušacka argued that “the factual detail in the charges against Mr Lubanga was sufficient only in respect of the nine children who were allegedly conscripted, enlisted and used in hostilities by” Lubanga’s army and, because these nine cases were excluded from evidence by the Trial Chamber, “Mr Lubanga was convicted of charges that were insufficiently detailed.” *Id.* Dissenting Opinion of Judge Ušacka, ¶ 1. Stressing that it was “entirely unforeseeable” at the start of trial that the Trial Chamber would exclude the evidence of the nine child soldiers, Judge Ušacka observed that even the Prosecution focused on these individual cases through trial and in its final submissions. *Id.* ¶ 20. Thus, in Judge Ušacka’s opinion, Lubanga’s right to be informed of the charges against him “was violated to such an extent that it was utterly impossible for him to defend himself against the charges presented.” *Id.*

¹⁰⁵ *See generally id.*

¹⁰⁶ *The Prosecutor v. Germain Katanga*, Warrant of Arrest for Germain Katanga, ICC-01/04-01/07 (Pre-Trial Chamber I, 2 July 2007).

¹⁰⁷ *Id.*

¹⁰⁸ *See infra* n. 121 *et seq.* and accompanying text.

was charged with bearing criminal responsibility for the same crimes alleged against Mr. Katanga.¹⁰⁹

1. *The Confirmation Process*

Although Mr. Katanga was not transferred to the custody of the ICC until October 2007,¹¹⁰ Judge Sylvia Steiner – once again appointed to act as Single Judge¹¹¹ – began to address issues of disclosure as soon as Pre-Trial Chamber I had authorized the arrest warrant.¹¹²

Specifically, on 6 July 2007, Judge Steiner issued a decision “establishing from the outset” a disclosure calendar, expressing hope that such action would lead to more expeditious pre-trial proceedings as compared with the *Lubanga* case.¹¹³ Nevertheless, a number of disclosure issues remained outstanding at the time of Mr. Katanga’s transfer to the Court on 18 October 2007,¹¹⁴ thus the date of the confirmation hearing was initially set for 28 February 2008.¹¹⁵

In accordance with the initial date of the confirmation hearing, Judge Steiner issued a set of deadlines to ensure that the Defense would have

¹⁰⁹ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision of the Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-257 (Pre-Trial Chamber I, 10 March 2008).

¹¹⁰ See International Criminal Court Press Release, *Second Arrest: Germain Katanga Transferred into the Custody of the ICC*, ICC-20071018-250-En, 18 October 2007.

¹¹¹ *Situation in the Democratic Republic of Congo*, Decision on the Designation of a Single Judge, ICC-01/04-328 (Pre-Trial Chamber I, 11 May 2007) (designating Judge Steiner as Single Judge for the DRC situation “and any related case”).

¹¹² See, e.g., *The Prosecutor v. Germain Katanga*, Decision Rejecting the Prosecution Urgent Request and Establishing a Calendar for the Disclosure of the Supporting Materials for the Prosecution Application for a Warrant of Arrest Against Germain Katanga, ICC-01/04-01/07-5 (Pre-Trial Chamber I, 6 July 2007); *The Prosecutor v. Germain Katanga*, Decision Altering the Calendar for the Submission of Formatted Version of the Arrest Warrant Application and Redacted Witness Statements, ICC-01/04-01/07-9 (Pre-Trial Chamber I, 10 July 2007); *The Prosecutor v. Germain Katanga*, Decision on the Prosecution’s Application Pursuant to Rules 81(2) and 81(4), ICC-01/04-01/07-16 (Pre-Trial Chamber I, 29 August 2007).

¹¹³ *Katanga*, Decision Rejecting the Prosecution Urgent Request and Establishing a Calendar for the Disclosure of the Supporting Materials for the Prosecution Application for a Warrant of Arrest Against Germain Katanga, *supra* n. 112, at 5.

¹¹⁴ *The Prosecutor v. Germain Katanga*, Decision Modifying the Calendar for the Disclosure of the Supporting Materials of the Prosecution Application for a Warrant of Arrest Against Germain Katanga, ICC-01/04-01/07-60, Public Redacted Version of ICC-01/04-01/07-28-US-Exp (Pre-Trial Chamber I, 18 October 2007).

¹¹⁵ See *The Prosecutor v. Germain Katanga*, Transcript of First Appearance, ICC-01/04-01/07-T-5, at 29: 12-13 (Transcript, 22 October 2007).

access to all of the evidence on which the Prosecutor intended to rely, as well as the bulk of exculpatory evidence, within thirty days of the start of the hearing.¹¹⁶ However, as of 30 January 2008, requests for measures of protection relating to “more than half of the witnesses on which the Prosecution intend[ed] to rely at the confirmation hearing” remained pending before the Victims and Witnesses Unit.¹¹⁷ At the same time, the Prosecutor had instituted a new practice, not used in the context of the *Lubanga* proceedings, which involved requesting redactions to witness statements and related material to protect the names or identifying information of so-called “innocent third parties” – *i.e.*, persons who were neither Prosecution sources themselves nor related in any way to a Prosecution source, but who are nevertheless mentioned in a witness statement.¹¹⁸ Thus, even in relation to those witnesses accepted into the Court’s protection program, the identity of whom was disclosed to the Defense, the Prosecution was still submitting a high number of redaction requests for the material related to that protected witness.¹¹⁹ Accordingly, on 30 January 2008, the Pre-Trial Chamber indefinitely postponed the confirmation hearing scheduled for 28 February.¹²⁰

A further delay arose in the confirmation of Mr. Katanga when, in March 2008, the Pre-Trial Chamber determined that the case against

¹¹⁶ *The Prosecutor v. Germain Katanga*, Corrigendum to the Decision Establishing Time Limits for Decisions on Protective Measures and Requests for Redactions, ICC-01/04-01/07-103 (Pre-Trial Chamber I, 13 December 2007).

¹¹⁷ *The Prosecutor v. Germain Katanga*, Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing, ICC-01/04-01/07-172, at 6 (Pre-Trial Chamber I, 30 January 2008).

¹¹⁸ *See, e.g., The Prosecutor v. Germain Katanga*, First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, ICC-01/04-01/07-90, ¶¶ 44-56 (Pre-Trial Chamber I, 7 December 2007); *The Prosecutor v. Germain Katanga*, Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, ICC-01/04-01/07-160, ¶ 5 (Pre-Trial Chamber I, 23 January 2008).

¹¹⁹ *See, e.g., Katanga*, First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, *supra* n. 118, ¶ 10 (noting that the decision deals only with the “redactions requested by the Prosecution in relation to the statements and interviews of seven witnesses who have already been accepted in the protection program of the Victims and Witnesses Unit,” but that the confidential portion of the decision analyzing those requests was nevertheless “particularly lengthy”).

¹²⁰ *Katanga*, Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing, *supra* n. 117.

Mathieu Ngudjolo Chui would be joined with that of Mr. Katanga.¹²¹ Mr. Ngudjolo initially appeared before the ICC on 11 February 2008,¹²² at which point the Pre-Trial Chamber designated 21 May 2008 as the first day of the confirmation of charges hearing.¹²³ The following month, when the Chamber joined the two cases, it maintained the 21 May date for the start of the joint hearing.¹²⁴

In late April, the Pre-Trial Chamber again postponed the confirmation of charges hearing, pushing the date back to 27 June 2008.¹²⁵ Around the same time, on 25 April 2008, Judge Steiner issued yet another decision relating to the level of disclosure required prior to the start of the confirmation of charges hearing.¹²⁶ Judge Steiner made a number of observations regarding the Prosecution's practices regarding witness protection during the pre-trial stage of proceedings.¹²⁷ In light of these observations, and the large number of requests for redactions still pending, Judge Steiner decided that, as a general rule, she would reject the Prosecution's requests for redactions in documents relating to witnesses on whom it intended to rely at the hearing, thereby leaving it to the Prosecution to disclose summaries of the evidence rather than the redacted statements of the witnesses themselves.¹²⁸ In another decision issued shortly thereafter, the judge also clarified that

¹²¹ *Katanga & Ngudjolo*, Decision of the Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui, *supra* n. 109.

¹²² *See id.* at 3.

¹²³ *Id.*

¹²⁴ *Id.* at 12.

¹²⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Establishing a Calendar According to the Date of the Confirmation Hearing: 27 June 2008, 01/04-01/07-459 (Pre-Trial Chamber I, 29 April 2008).

¹²⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428-Corr (Pre-Trial Chamber I, 25 April 2008).

¹²⁷ *Id.* ¶ 55. For example, the judge highlighted the "Prosecution's practice of referring the great majority of the witnesses on whom it intends to rely at the confirmation hearing" to the witness protection program. *Id.* She also observed that the Prosecution has demonstrated a tendency to rely on a "high number of witnesses" at the confirmation hearing. *Id.* These factors, according to the judge, have "led to a situation that is not sustainable in relation to every confirmation hearing held before this Court," particularly as the witness protection programs for each case do not come to an end at the close of the confirmation hearings, and indeed are likely to grow as the Prosecutor prepares for trial. *Id.*

¹²⁸ *Id.* ¶ 90.

the Prosecution need only disclose the “bulk” of exculpatory material in its possession prior to the confirmation hearing.¹²⁹

The confirmation hearing in the *Katanga & Ngudjolo* case commenced on 27 June 2008 and ended on 16 July 2008.¹³⁰ Following the close of the oral hearing, the Chamber once again authorized the filing of post-hearing submissions by the parties and participating victims.¹³¹ The Chamber also announced that, although the Court’s regulations require that the confirmation decision be issued within sixty days “from the date the confirmation hearing ends,”¹³² this clock would not start to run until after the Chamber received the final post-hearing brief,¹³³ an approach that has been followed in all subsequent cases.¹³⁴

¹²⁹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defense’s Preparation for the Confirmation Hearing, ICC-01/04-01/07-621 (Pre-Trial Chamber I, 20 June 2008).

¹³⁰ *Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 35, ¶ 59.

¹³¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of Hearing (Open Session), ICC-01/04-01/07-T-50-ENG, at 8-9 (Transcript, 16 July 2008).

¹³² ICC Regulations of the Court, *supra* n. 81, Reg. 53.

¹³³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of Hearing (Open Session), ICC-01/04-01/07-T-50-ENG, at 8-9 (Pre-Trial Chamber I, 16 July 2008) (“Following the precedents of this Chamber in the case versus Thomas Lubanga Dyilo, of giving the parties and participants time to file written statements, the Chamber considers the end of the confirmation hearing to be the submission of the last written observations, and therefore the 60 days will start running from the 29th of July.”).

¹³⁴ See, e.g., *The Prosecutor v. Bahar Idriss Abu Garda*, Transcript of Hearing, ICC-02/05-02/09, at 83: 4-9 (Pre-Trial Chamber I, 30 October 2009); *The Prosecutor v. William Samoei Ruto, et al.*, Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute, ICC-01/09-01/11-357, ¶ 9 (Pre-Trial Chamber II, 26 October 2011); *The Prosecutor v. Laurent Gbagbo*, Transcript of Hearing, ICC-02/11-01/11-T-21-ENG, at 51: 5-9 (Transcript, 28 February 2013). It should be noted that, in a recently published manual setting forth best practices at the pre-trial stage, the judges of the ICC’s Pre-Trial Division state that “[t]he 60-day time limit for the issuance of the decision on the confirmation of charges in accordance with regulation 53 of the Regulations of the Court starts running from the moment the confirmation hearing ends with the last *oral* final observation.” International Criminal Court, *Pre-Trial Practice Manual*, at 15 (September 2015) (emphasis added). However, there is nothing to suggest that the observations in the manual are binding.

On 1 October 2008, Pre-Trial Chamber I issued a decision confirming the majority of the charges against each of the two suspects.¹³⁵ In its decision, the Chamber reiterated that the purpose of the confirmation process was to “protect the rights of the Defence against wrongful and wholly unfounded charges.”¹³⁶ The Chamber also affirmed that the “confirmation hearing has a limited scope and purpose and should not be seen as a ‘mini-trial’ or a ‘trial before the trial.’”¹³⁷ Finally, in its assessment of evidence, the Chamber stressed that “any ruling on the admissibility of a particular item of evidence for the purposes of the confirmation hearing and the present decision will not preclude a subsequent determination of the admissibility of that same evidence later in the proceedings,” as “the admission of evidence [at the pre-trial stage] is without prejudice to the Trial Chamber’s exercise of its functions and powers to make a final determination as to the admissibility and probative value of any evidence.”¹³⁸

On 24 October 2008, the Presidency constituted Trial Chamber II and referred to it the case against Messrs. Katanga and Ngudjolo.¹³⁹ Initially, the Trial Chamber set the commencement of the trial for 24 September 2009.¹⁴⁰ However, on 31 August 2009, the Trial Chamber postponed the trial start date to 24 November 2009, over two years since Mr. Katanga’s initial appearance at the Court.¹⁴¹ The Trial Chamber ordered the postponement of the commencement of the trial because of substantial issues regarding the disclosure and presentation

¹³⁵ *Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 35. Note that, although the charges were confirmed on 26 September 2008, the decision was not publicly released until 1 October 2008.

¹³⁶ *Id.* ¶ 63.

¹³⁷ *Id.* ¶ 64.

¹³⁸ *Id.* ¶ 71.

¹³⁹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Constituting Trial Chamber II and Referring to It the Case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-729 (Presidency, 24 October 2008).

¹⁴⁰ *Le Procureur c. Germain Katanga et Mathieu Ngudjolo Chui*, Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve), ICC-01/04-01/07-99 (Trial Chamber II, 27 March 2009).

¹⁴¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Postponing the Date of the Commencement of the Trial (Rule 132(1) of the Rules of Procedure and Evidence), ICC-01/04-01/07-1442-tENG, ¶ 1 (Trial Chamber II, 31 August 2009).

of incriminating evidence,¹⁴² issues regarding the potentially unlawful arrest of Mr. Katanga in the DRC,¹⁴³ and issues related to protective measures for both the Prosecution and Defense witnesses.¹⁴⁴

2. *Trial Chamber's Decision Under Regulation 55 and the Judgment Acquitting Mr. Ngudjolo*

The presentation of evidence by both parties in the case ended on 11 November 2011.¹⁴⁵ One year later, over five years since Mr. Katanga's initial appearance, and more than four years after the Pre-Trial Chamber had confirmed the charges in the case, the Trial Chamber issued a decision alerting the parties that it would exercise its Regulation 55 powers and consider re-characterizing the mode of liability charged against Mr. Katanga from indirect co-perpetration to complicity.¹⁴⁶ Judge Christine Van den Wyngaert dissented from the decision, arguing that the majority's decision both violated Regulation 55 itself and violated the rights of the accused to a fair trial.¹⁴⁷ As to the first point, Judge Van den Wyngaert argued, *inter alia*, that the majority was improperly relying on Regulation 55 because its proposed recharacterization would "fundamentally change the narrative of the charges in order to reach a conviction on the basis of a crime or form of criminal responsibility that was not originally charged by the prosecution."¹⁴⁸ On the issue of the accused's rights to a fair trial, Judge Van den Wyngaert explained that "by triggering

¹⁴² *Id.* ¶¶ 2-16 (noting problems with understanding the Table Presenting all Incriminating Evidence the Prosecution intended to use at trial, particularly that the table was 1,165 pages, relied on the same factual allegations and evidence to prove different constituent crimes with different elements, and relied on the document containing the charges instead of the Pre-Trial Chamber's Decision Confirming the Charges).

¹⁴³ *Id.* ¶¶ 18-21 (waiting for the response of the Registry and the Government of the Democratic Republic of the Congo to file observations on defense allegations that Mr. Katanga was unlawfully arrested and detained by the DRC authorities).

¹⁴⁴ *Id.* ¶¶ 22-26 (noting a myriad of protections issues, including: the Prosecution's late request for redactions and differing approaches between Trial Chamber I and Trial Chamber II on protective orders).

¹⁴⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, ICC-01/04-01/07-3319-tENG/FRA, ¶ 3 (Trial Chamber II, 21 November 2012).

¹⁴⁶ *Id.* ¶ 7.

¹⁴⁷ *Id.* Dissenting Opinion of Judge Christine Van den Wyngaert.

¹⁴⁸ *Id.* Dissenting Opinion of Judge Christine Van den Wyngaert, ¶ 19.

Regulation 55 to change the mode of liability at the end of the deliberation stage,” the majority had created “the unpalatable suspicion that the Chamber is intervening to ensure the conviction of Germain Katanga.”¹⁴⁹ Furthermore, Judge Van den Wyngaert contended that, because the majority’s notification was “entirely unforeseeable” to the Defense and was given “at a point in the proceedings when the [D]efence is unable to effectively respond to it,” the decision violated the accused’s right to be “informed promptly and in detail of the nature, cause and content of the charge,” as well as the right “not to be compelled to testify or to confess guilt.”¹⁵⁰ Finally, Judge Van den Wyngaert argued that the majority’s decision threatened the accused’s right to a speedy trial because, to “meaningfully defend itself against the charges under Article 25(3)(d)(ii), the [D]efence may... have to present an entirely new case.”¹⁵¹

Because the decision only affected the case against Mr. Katanga, the Trial Chamber also severed the two cases, holding that it would issue a separate judgment against Mr. Ngudjolo in line with the initial charges confirmed by the Pre-Trial Chamber.¹⁵² That judgment, acquitting Mr. Ngudjolo of all charges, was delivered on 18 December 2012.¹⁵³

3. Trial Chamber Judgment against Mr. Katanga

On 7 March 2014, nearly six and one half years after Mr. Katanga’s arrest, the Trial Chamber issued its judgment finding Mr. Katanga guilty, by majority, of one crime against humanity and four war

¹⁴⁹ *Id.* Dissenting Opinion of Judge Christine Van den Wyngaert, ¶¶ 27-28.

¹⁵⁰ *Id.* Dissenting Opinion of Judge Christine Van den Wyngaert, ¶ 36.

¹⁵¹ *Id.* Dissenting Opinion of Judge Christine Van den Wyngaert, ¶ 49. The Katanga Defense appealed the Trial Chamber’s invocation of Regulation 55, but a majority of the Appeals Chamber, with Judge Tarfusser dissenting, held that the Trial Chamber would not necessarily violate any of Mr. Katanga’s due process rights by changing the mode of liability. See *The Prosecutor v. Germain Katanga*, Judgment on the Appeal of Mr German Katanga Against the Decision of Trial Chamber II of 21 November 2012 entitled “Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Person” (Appeals Chamber, 27 March 2013).

¹⁵² *Katanga & Ngudjolo*, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, *supra* n. 145, ¶¶ 9, 58-64.

¹⁵³ *The Prosecutor v. Mathieu Ngudjolo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-02/12-3-tENG (Trial Chamber II, 18 December 2012).

crimes.¹⁵⁴ In convicting Mr. Katanga, the majority modified the mode of liability applied to Mr. Katanga from indirect co-perpetration under Article 25(3)(a) of the Rome Statute to “accessoryship [*sic*] through a contribution made ‘in any other way to the commission of a crime by a group of persons acting with a common purpose’” under Article 25(3)(d).¹⁵⁵ Judge Van den Wyngaert again issued a minority opinion dissenting from the Trial Chamber’s judgment, reiterating the objections she raised to the majority’s initial notice of its intention to use Regulation 55.¹⁵⁶ Additionally, Judge Van den Wyngaert stated that, even if re-characterizing the mode of liability was proper, the evidence was insufficient to convict Mr. Katanga.¹⁵⁷

On May 23 2014, Mr. Katanga was sentenced to twelve years imprisonment.¹⁵⁸ Although both parties initially appealed the judgment convicting Mr. Katanga, they ultimately submitted a Notice of Discontinuance of Appeal, terminating the appeal proceedings.¹⁵⁹

D. The Prosecutor v. Jean-Pierre Bemba Gombo

On 9 May 2008, the Prosecutor filed an Article 58 application for a warrant of arrest for Jean-Pierre Bemba Gombo.¹⁶⁰ Pre-Trial Chamber III granted an initial warrant on 23 May 2008, concluding that there were reasonable grounds to believe that Mr. Bemba was criminally responsible for two counts of crimes against humanity and four counts

¹⁵⁴ *The Prosecutor v. Germain Katanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/07, at 658-59 (Trial Chamber II, 7 March 2014).

¹⁵⁵ *Id.* The majority also invoked Regulation 55 to modify the legal characterization of facts to reflect that the armed conflict connected to the charges was non-international in nature during the period from August 2002 to May 2003. *Id.* at 658.

¹⁵⁶ *Id.* Minority Opinion of Judge Christine Van den Wyngaert, ¶¶ 2, 9.

¹⁵⁷ *Id.* Minority Opinion of Judge Christine Van den Wyngaert, ¶ 317.

¹⁵⁸ *The Prosecutor v. Germain Katanga*, Décision relative à la peine (article 76 du Statut), ICC-01/04-01/07, ¶ 170 (Trial Chamber II, 23 May 2014).

¹⁵⁹ See *The Prosecutor v. Germain Katanga*, Notice of Discontinuance of the Prosecution’s Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga, ICC-01/04-01/07 (Office of the Prosecutor, 25 June 2014); *The Prosecutor v. Germain Katanga*, Defence Notice of Discontinuance of Appeal against the ‘*Jugement rendu en application de l’article 74 du Statut*’ rendered by Trial Chamber II on 7 April 2014, ICC-01/04-01/07 (Defense, 25 June 2014).

¹⁶⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Warrant of Arrest for Jean-Pierre Bemba Gombo, ICC-01/05-01/08-1-tENG, ¶ 4 (Pre-Trial Chamber III, 23 May 2008).

of war crimes,¹⁶¹ and Mr. Bemba was arrested the next day in Belgium.¹⁶² Following Mr. Bemba's arrest, the Prosecution submitted additional information regarding certain charges against the suspect per a request by the Pre-Trial Chamber, and the Chamber ultimately issued a new warrant of arrest adding one count of murder as a crime against humanity and one count of murder as a war crime.¹⁶³ Mr. Bemba made his initial appearance on 4 July 2008.¹⁶⁴

1. *The Confirmation Process*

The Prosecution filed its initial Document Containing the Charges against the suspect on 1 October 2008,¹⁶⁵ with an anticipated confirmation of charges start date of 4 November 2008.¹⁶⁶ Once again, a disclosure calendar was established in view of this date.¹⁶⁷ Unlike the first two cases that went through confirmation, however, the Chamber overseeing the *Bemba* confirmation held that the Prosecutor needed to disclose *all* evidence in its possession that it believed may be exculpatory pursuant to Article 67(2) or should be shared with the Defense pursuant to Rule 77, rather than just the "bulk" of such evidence.¹⁶⁸ Furthermore, the *Bemba* Pre-Trial Chamber required that *all* evidence disclosed between the parties be shared with the Chamber,¹⁶⁹ even though Rule 121(2)(c) states only that "[a]ll

¹⁶¹ *Id.* ¶ 21 (finding reasonable grounds to believe that Jean-Pierre Bemba Gombo was criminally responsible for rape as a crime against humanity, rape as a war crime, torture as a crime against humanity, torture as a war crime, outrages upon personal dignity as a war crime, and pillaging as a war crime).

¹⁶² *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, ¶ 8 (Pre-Trial Chamber III, 10 June 2008) (surrendering Mr. Bemba to the ICC on 3 July 2008).

¹⁶³ *Id.* ¶ 9.

¹⁶⁴ *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 33, ¶ 4.

¹⁶⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute, ICC-01/05-01/08-388, ¶ 2 (Pre-Trial Chamber III, 3 March 2009).

¹⁶⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Postponement of the Confirmation Hearing, ICC-01/05-01/08-170-tENG, ¶ 1 (Pre-Trial Chamber III, 17 October 2008).

¹⁶⁷ *Id.* ¶¶ 1-23.

¹⁶⁸ *See Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, ¶ 28 (Pre-Trial Chamber III, 13 July 2008).

¹⁶⁹ *Id.* ¶¶ 8-19.

evidence disclosed between the Prosecutor and the person *for the purposes of the confirmation hearing* shall be communicated to the Pre-Trial Chamber.”¹⁷⁰ The Chamber justified this approach by citing to Article 69(3) of the Rome Statute, which states that “[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”¹⁷¹ While acknowledging that this provision appears under Part IV of the Statute, which is entitled “The trial,” the Chamber nevertheless determined that the language “establishes a general principle which applies to the various stages of the proceedings.”¹⁷²

The Chamber also introduced a new requirement in the form of an in-depth analysis chart, which was to be shared with both the Defense and the Chamber.¹⁷³ The general approach of the analysis chart requires every piece of evidence, especially incriminatory evidence, to be linked to the relevant constituent elements of the crimes charged by the Prosecutor.¹⁷⁴ The Chamber reasoned that this method would allow it to verify that each constituent element of any charged crime, including contextual elements as well as modes of liability, has at least one corresponding piece of evidence.¹⁷⁵ The Chamber also held that if the Defense intended to present evidence or rely on evidence disclosed by the Prosecutor it would also have to follow the same approach.¹⁷⁶

As seen in earlier cases, the Prosecution once again failed to comply with the disclosure timetable and the hearing date was postponed to 8 December 2008.¹⁷⁷ In announcing this postponement, the Chamber

¹⁷⁰ ICC Rules, *supra* n. 29, R. 121(2)(c) (emphasis added).

¹⁷¹ *Bemba*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, *supra* n. 168, ¶ 8.

¹⁷² *Id.* ¶ 9.

¹⁷³ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Status Conference, CC-01/05-01/08-T-8-CONF-ENG CT, at 30: 10-20 (Transcript, 22 October 2008) (“Even if this is already in the transcript, I repeat that the order – the Chamber orders the Prosecution to disclose an analysis chart of the evidence, incriminating and exonerating, which must be in one document, consolidated in one document, and disclosed 30 days at the latest before the date of the Confirmation Hearing.”).

¹⁷⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence, ICC-01/05-01/08- 232, ¶ 6 (Pre-Trial Chamber III, 10 November 2008).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* ¶ 9.

¹⁷⁷ *Bemba*, Decision on the Postponement of the Confirmation Hearing, *supra* n. 166, at 7; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Setting the Date of the

expressed its concern over the disclosure process, noting “the existence of significant problems...[,] especially regarding the Prosecutor’s obligation to disclose this material to the Defence correctly, fully and diligently in accordance with the timetable set in the Decision of 31 July 2008.”¹⁷⁸ The hearing was postponed a second time due to a family emergency on the part of one of the Pre-Trial Chamber judges,¹⁷⁹ and ultimately took place from 12 to 15 January 2009.¹⁸⁰

Following the confirmation hearing, the Chamber exercised its powers under Article 61(7)(c)(ii) and adjourned the hearing to request that the Prosecution consider adding charges under a superior responsibility theory of liability.¹⁸¹ The Chamber granted the Prosecutor until 30 March 2009 and the Defense until 24 April 2009 to file written submissions regarding this request.¹⁸² Further, the Chamber again determined that its sixty-day deadline to issue a confirmation decision did not start until all submissions were received.¹⁸³ The Chamber finally issued a decision in June 2009, almost a full year after Mr. Bemba’s initial appearance, confirming the majority of charges under a theory of superior responsibility.¹⁸⁴ The Prosecutor sought leave to appeal the decision with regard to three counts that were not

Confirmation Hearing, ICC-01/05-01/08-199-tENG, 6 (Pre-Trial Chamber III, 31 October 2008).

¹⁷⁸ *Id.* ¶ 23.

¹⁷⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Postponement of the Confirmation Hearing, ICC-01/05-01/08-304, ¶ 6 (Pre-Trial Chamber III, 2 December 2008). *See also The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Setting the Date of the Confirmation Hearing, ICC-01/05-01/08-335, at 6 (Pre-Trial Chamber III, 29 December 2008).

¹⁸⁰ *Bemba*, Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute, *supra* n. 165, ¶¶ 6-7.

¹⁸¹ *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 33, ¶ 343.

¹⁸² *Bemba*, Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute, *supra* n. 165, at 19.

¹⁸³ *Id.* ¶ 11. *See also The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of the Amended Document Containing the Charges Filed on 30 March 2009, ICC-01/05-01/08-395-Anx3 (Pre-Trial Chamber II, 30 March 2009); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Conclusions de la Defense en reponse a l’acte d’accusation amende du 30 mars 2009, ICC-01/05-01/08-413 (Pre-Trial Chamber II, 24 April 2009).

¹⁸⁴ *See generally Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 33.

confirmed, but on 18 September 2009, the Pre-Trial Chamber denied the request.¹⁸⁵ On the same day, the Presidency constituted Trial Chamber III and referred to it the case against Mr. Bemba.¹⁸⁶

2. *Admission of Evidence Used During the Confirmation Hearing*

Approximately four months after the case was transferred to the Trial Chamber, the Prosecution submitted its list of the evidence upon which it intended to rely at trial.¹⁸⁷ Eleven months later, the Trial Chamber issued a decision holding that it would *prima facie* admit all such evidence in an effort to contribute to the “expeditiousness and proper conduct of the proceedings.”¹⁸⁸ In support of its decision, the Trial Chamber noted that “[m]ost of the witnesses’ written statements and related documents to be relied upon by the prosecution at trial were collected, disclosed and used as evidence forming the basis for confirming the charges at pre-trial stage” and that “the role of Pre-Trial Chambers is to prepare the case for trial.”¹⁸⁹ However, both parties appealed the ruling and the Appeals Chamber reversed, holding that the admission of evidence without an “item-by-item evaluation” was not contemplated by the legal framework of the Court.¹⁹⁰ In explaining its holding, the Appeals Chamber noted that the “Trial Chamber’s argumentation as to the link between the pre-trial and trial phases is unpersuasive,” stressing that, although there “is, and must be,

¹⁸⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” (Pre-Trial Chamber II, 18 September 2009).

¹⁸⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Constituting Trial Chamber III and referring to it the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (Presidency, 18 September 2009).

¹⁸⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Admission Into Evidence of Materials Contained in the Prosecution’s List of Evidence, ICC-01/05-01/08-1022, ¶ 1 (Trial Chamber III, 19 November 2010).

¹⁸⁸ *Id.* ¶ 27.

¹⁸⁹ *Id.*

¹⁹⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence,” ICC-01/05-01/08-1386, ¶ 2 (Appeals Chamber, 3 May 2011).

a strong link between the two phases of the proceedings, this does not mean that the same evidentiary rules apply.”¹⁹¹

3. Trial Chamber’s Notice Under Regulation 55

Mr. Bemba’s trial commenced on 22 November 2010,¹⁹² and the Prosecution’s case closed on 20 March 2012.¹⁹³ The Defense opened its case on 14 August 2012.¹⁹⁴ However, on 21 September 2012 – three years after the charges were confirmed and almost two years after the start of the trial – the Trial Chamber gave notice pursuant to Regulation 55 that it may modify the legal characterization of the facts.¹⁹⁵ Specifically, the Trial Chamber informed the parties that it would consider not only whether Mr. Bemba is responsible for the charged crimes on the ground that he “knew” that forces under his effective command and control had committed or were about to commit the relevant crimes, as confirmed by the Pre-Trial Chamber, but also whether he “should have known” about such acts.¹⁹⁶ The Trial Chamber made clear that it would not decide whether to re-characterize the charges until it had heard all of the evidence in the case, and that it was merely notifying the parties of the possibility of a re-characterization, pursuant to Regulation 55(2).¹⁹⁷

The presentation of evidence in the *Bemba* case closed on 7 April 2014, and briefly reopened from 22 to 24 October 2014 to recall one witness regarding potential allegations under Article 70 of the Rome Statute, which governs offenses against the administration of justice.¹⁹⁸ At the time of writing, the Trial Chamber has yet to set a date for the release of the judgment.

¹⁹¹ *Id.* ¶ 80.

¹⁹² *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defense Submission on the Trial Chamber’s Notification under Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2365-Red, ¶ 6 (Defense, 18 October 2012).

¹⁹³ *Id.*

¹⁹⁴ *Id.* ¶ 8.

¹⁹⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Giving Notice to the Parties And Participant that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2324, ¶ 5 (Trial Chamber III, 21 September 2012).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* ¶ 4.

¹⁹⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Hearing (Open Session), ICC-01/05-01/08-T-364-ENG ET WT 12-11-2014 4/98 SZ T, at 4: 2-8 (Transcript, 12 November 2014).

E. The Prosecutor v. Bahar Idriss Abu Garda

Bahar Idriss Abu Garda was charged with allegedly leading a faction of the Justice and Equality Movement (JEM) rebel group in Darfur responsible for attacking members of the African Union Mission in Sudan (AMIS) peacekeeping personnel at the Military Group Site (MGS) Haskanita in North Darfur, Sudan.¹⁹⁹ Mr. Abu Garda was the first suspect to be summoned for voluntary appearance before the Court under Article 58(7), as opposed to being the subject of a warrant of arrest.²⁰⁰ He made his initial appearance on 18 May 2009,²⁰¹ and the hearing was set for 12 October 2009.²⁰²

In terms of disclosure, the Pre-Trial Chamber chose to follow the system implemented in the *Lubanga* and *Katanga & Ngudjolo* confirmation proceedings, as opposed to that adopted by the *Bemba* Pre-Trial Chamber, meaning that disclosure would take place *inter partes* and the parties were required to share with the Chamber only that evidence that they intended to rely upon at the hearing.²⁰³ Notably, whereas the *Bemba* Pre-Trial Chamber had supported its decision requiring that *all* evidence be shared with the Chamber by citing to the provision of the Rome Statute stating that “[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth,”²⁰⁴ the *Abu Garda* Chamber held that the purpose of communicating evidence to the Pre-Trial Chamber was simply to allow the Chamber to “properly organize and conduct the confirmation hearing.”²⁰⁵

In contrast to previous cases, the start of the confirmation hearing in the *Abu Garda* case was only delayed one week from the initial date set during the first status conference.²⁰⁶ Again, however, the delay was

¹⁹⁹ *The Prosecutor v. Bahar Idriss Abu Garda*, Summons to Appear for Bahar Idriss Abu Garda, ICC-02/05-02/08-2, ¶¶ 10-12 (Pre-Trial Chamber I, 7 May 2009).

²⁰⁰ *Id.* ¶ 20.

²⁰¹ *Abu Garda*, Decision on the Confirmation of Charges, *supra* n. 33, ¶ 5.

²⁰² *Id.*

²⁰³ *The Prosecutor v. Bahar Idriss Abu Garda*, Second Decision on Issues Relating to Disclosure, ICC-02/05-02/09-35, ¶¶ 8-9 (Pre-Trial Chamber I, 15 July 2009).

²⁰⁴ See *supra* n. 171 and accompanying text.

²⁰⁵ *Abu Garda*, Second Decision on Issues Relating to Disclosure, *supra* n. 203, ¶ 8.

²⁰⁶ See *The Prosecutor v. Bahar Idriss Abu Garda*, Decision Scheduling a Hearing on Issues Relating to Disclosure between the Parties, ICC-02/05-02/05-18, ¶ 1 (Pre-Trial Chamber I, 30 May 2009) (setting the confirmation of charges hearing for 12

due to a failure on the part of the Prosecution to meet disclosure deadlines.²⁰⁷ Indeed, in one decision granting an extension of a disclosure deadline to the Prosecution, the Chamber noted that the Office had repeatedly submitted requests for extension of time limit at the actual expiration of the time late, making it nearly impossible for the Chamber to decide in a timely manner or for the Prosecution to meet its deadline should the request be denied.²⁰⁸

Ultimately, the confirmation hearing in the case was held between 19 and 30 October 2009.²⁰⁹ The Pre-Trial Chamber issued its decision on 8 February 2010, declining to confirm any of the charges after finding that the Prosecution had not met its burden of establishing substantial grounds to believe that there was a nexus between Mr. Abu Garda and the alleged attack on MGS Haskanita.²¹⁰ Specifically, the Chamber noted that none of the witnesses presented by the Prosecution provided any first-hand knowledge regarding a meeting where Mr. Abu Garda was alleged to have planned an attack on MGS Haskanita.²¹¹ Moreover, the Chamber found that the Prosecution failed to even establish that Mr. Abu Garda was in charge of the armed group that attacked the peacekeeping forces, due to inconsistencies between the witnesses' summaries put forward.²¹² On 23 April 2010, the Chamber issued a decision rejecting the Prosecutor's application to appeal the decision declining to confirm the charges.²¹³

It is worth noting that, notwithstanding the Chamber's decision to decline the charges against Mr. Abu Garda, the Pre-Trial Chamber engaged in a lengthy factual and legal analysis of the issues in the case. Specifically, the Chamber expounded on the Darfur conflict;²¹⁴

October 2009); *Abu Garda*, Decision on the Confirmation of Charges, *supra* n. 33, ¶ 13 (stating the confirmation of charges hearing took place from 19 October 2009 to 30 October 2009).

²⁰⁷ *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Prosecutor's Request for Extension of Time-Limit, ICC-02/05-02/09-98, 4-5 (Pre-Trial Chamber I, 11 September 2009).

²⁰⁸ *Id.*

²⁰⁹ *Abu Garda*, Decision on the Confirmation of Charges, *supra* n. 33, ¶ 13.

²¹⁰ *Id.* ¶¶ 173, 178-79, 196, 208, 213, 215.

²¹¹ *Id.* ¶ 168.

²¹² *Id.* ¶ 196.

²¹³ *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges,'" ICC-02/05-01/09-267 (Pre-Trial Chamber I, 23 April 2010).

²¹⁴ *Abu Garda*, Decision on the Confirmation of Charges, *supra* n. 33, ¶¶ 15-20.

discussed the jurisdiction and admissibility of the case,²¹⁵ despite Mr. Abu Garda not challenging the jurisdiction or admissibility;²¹⁶ and analyzed whether or not there was an armed conflict in Darfur at the time of the alleged attack, even though this finding was irrelevant given the Chamber's finding regarding the lack of evidence against Mr. Abu Garda personally.²¹⁷ The Chamber also defined element by element each of the charges against Mr. Abu Garda, not in relation to his individual criminal responsibility, but rather in a theoretical and abstract approach.²¹⁸ In concurring with the decision to decline the confirmation of charges against Mr. Abu Garda, Judge Cuno Tarfusser issued a separate opinion criticizing the Chamber's insistence on conducting a full legal analysis despite the Prosecution's presentation of insufficient evidence.²¹⁹ Specifically, Judge Tarfusser wrote that the "lacunae and shortcomings exposed by the mere factual assessment of the evidence" presented by the Prosecution were "so basic and fundamental" that the Chamber should have completely refrained from analyzing the "legal issues pertaining to the merits of the case,"²²⁰ reasoning that such analysis is merely "academic."²²¹ Moreover, Judge Tarfusser emphasized that the Pre-Trial Chamber has a duty of judicial economy, and engaging in lengthy, yet irrelevant, legal exercises directly contradicts this duty.²²² Finally, Judge Tarfusser argued that the Chamber could potentially prejudice future decisions by making legal determinations regarding the facts of a specific attack when the Prosecution failed to meet its burden with respect to a specific suspect.²²³

²¹⁵ *Id.* ¶¶ 25-34.

²¹⁶ *Id.* ¶¶ 26-27.

²¹⁷ *Id.* ¶¶ 56-57.

²¹⁸ *See, e.g., Id.* ¶¶ 60-96 (discussing the meaning of each element of the crime of Article 8(2)(e)(iii) in terms of customary international law, the UN Charter, Additional Protocol I, and various academic sources, yet not discussing the elements in relation to the alleged attack).

²¹⁹ *Id.* Separate Opinion of Judge Cuno Tarfusser, ¶ 5.

²²⁰ *Id.* Separate Opinion of Judge Cuno Tarfusser, ¶ 3.

²²¹ *Id.* Separate Opinion of Judge Cuno Tarfusser, ¶ 7(i).

²²² *Id.* Separate Opinion of Judge Cuno Tarfusser, ¶ 7(ii).

²²³ *Id.* Separate Opinion of Judge Cuno Tarfusser, ¶ 7(iii).

F. The Prosecutor v. Abdullah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

The case against Abdullah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus arises out of the same factual situation as *Abu Garda*.²²⁴ Similarly to Mr. Abu Garda, both Messrs. Banda and Jerbo were summoned to appear instead of being subject to warrants of arrest,²²⁵ and they made their initial appearances on 17 June 2010.²²⁶ While the confirmation hearing was initially set for 22 November 2010, the Pre-Trial Chamber suspended the hearing after receiving a joint submission from the Prosecution and Defense in which both suspects waived their rights to be present at the confirmation hearing and agreed they would not be contesting any of the factual allegations against them.²²⁷ The suspects' challenge at the confirmation hearing was limited to the existence of a crime based on the admitted factual allegations.²²⁸ In response to the joint submission, Chamber delayed the confirmation hearing until 8 December 2010 to allow for written submissions on each suspect's waiver of the right to present at the hearing.²²⁹

²²⁴ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Second Decision on the Prosecutor's Application under Article 58, ICC-02/05-03/09-1, ¶ 8 (Pre-Trial Chamber I, 27 August 2009).

²²⁵ See *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Summons to Appear for Saleh Mohammed Jerbo Jamus, ICC-02/05-03/09-2 (Pre-Trial Chamber I, 27 August 2009); *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Summons to Appear for Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-3 (Pre-Trial Chamber I, 27 August 2009).

²²⁶ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of the "Decision on the Confirmation of Charges," ICC-02/05-03/09-121-Corr-Red, ¶ 13 (Pre-Trial Chamber I, 7 March 2011).

²²⁷ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Joint Submission by the Office of the Prosecutor and the Defense as to Agreed Facts and Submissions Regarding Modalities for the Conduct of the Confirmation Hearing, ICC-02/05-03/09-80 (Pre-Trial Chamber I, 19 October 2010).

²²⁸ *Banda & Jerbo*, Corrigendum of the "Decision on the Confirmation of Charges," *supra* n. 226.

²²⁹ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision Postponing the Confirmation Hearing and Setting a Deadline for the Submission of the Suspects' Written Request to Waive their Right to Attend the Confirmation Hearing, ICC-02/05-03/09-181, ¶¶ 10-11 (Pre-Trial Chamber I, 22 October 2010).

Ultimately, the Chamber accepted the waivers and held a confirmation hearing on 8 December 2010, during which the Prosecutor presented evidence in the case in summary form to the Chamber.²³⁰ Despite the fact that the suspects did not challenge the underlying factual allegations, and despite the similarities between the case and that of the one against *Abu Garda*, which had been heard by the same three judges,²³¹ it took the Chamber another three months to issue a decision confirming the charges against the suspects.²³²

Shortly after the charges were confirmed against Messrs. Banda and Jerbo, the Presidency constituted Trial Chamber IV to handle the case,²³³ yet various delays, including those relating to translation, prevented the trial from beginning.²³⁴ On 4 October 2013, proceedings against Mr. Jerbo were terminated due to evidence suggesting he had died in Darfur.²³⁵ While the case against Mr. Banda is still ongoing, his voluntary cooperation with the Court appears to have come to an end and a warrant for his arrest has been issued that is outstanding at the time of this writing.²³⁶

²³⁰ *Banda & Jerbo*, Corrigendum of the “Decision on the Confirmation of Charges,” *supra* n. 226, ¶ 21.

²³¹ Pre-Trial Chamber I was comprised of Judges Tarfusser, Steiner, and Monageng for both *The Prosecutor v. Abu Garda* and *The Prosecutor v. Banda and Jerbo*. Judge Steiner acted as Presiding Judge in *Abu Garda* and Judge Tarfusser acted as Presiding Judge in *Banda and Jerbo*.

²³² *Banda & Jerbo*, Corrigendum of the “Decision on the Confirmation of Charges,” *supra* n. 226, ¶ 21.

²³³ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision Constituting Trial Chamber IV and Referring to it the Case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, ICC-02/05-03/09-124 (Presidency, 16 March 2011).

²³⁴ *See, e.g., The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Report of the Registrar Pursuant to Regulation 24 *bis* of the Regulations of the Court Concerning on the Issue of Languages to be Used in the Proceedings, ICC-02/05-03/09-150 (Trial Chamber IV, 24 May 2011) (suggesting that the Court should first translate the proceedings into Arabic and then into Zaghawa, and it would only delay proceedings by 30-35 percent provided that the parties remember to pause 15 seconds in between statements).

²³⁵ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Public Redacted Decision Terminating the Proceedings Against Mr. Jerbo, ICC-02/05-03/09-512-Red (Trial Chamber IV, 4 October 2013).

²³⁶ *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Warrant of Arrest for Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-606, ¶ 24 (Trial Chamber IV, 11 September 2014).

G. The Prosecutor v. Callixte Mbarushimana

Callixte Mbarushimana was charged with committing war crimes and crimes against humanity in North and South Kivu, DRC, through his role as Executive Secretary of the *Forces Démocratiques de Libération du Rwanda* (FDLR).²³⁷ An arrest warrant was issued on 28 September 2010,²³⁸ and Mr. Mbarushimana made his initial appearance on 28 January 2011.²³⁹

Regarding the system of disclosure, the *Mbarushimana* Chamber followed the *Abu Garda* Chamber's approach, meaning it only required that the parties share with the Chamber the evidence that they intended to rely upon at the hearing.²⁴⁰ Nevertheless, throughout the period leading up to the confirmation hearing, the Pre-Trial Chamber expressed concern at the way both the Prosecution and the Defense conducted themselves, particularly with regards to disclosure and filings.²⁴¹ The first issue arose when the Prosecution attempted to file an addendum to the Document Containing the Charges five days after the deadline, explaining that it was merely correcting inconsistencies and duplications in the initial filing.²⁴² However, when submitting its "corrected" version, the Prosecution significantly altered the filing, to the point where it was almost a new document.²⁴³ Thus, the Chamber ordered the Prosecution to re-file the addendum without any of the extra allegations and evidence it tried to admit.²⁴⁴ Moreover, the Chamber ordered the Registry to strike any additional information,

²³⁷ See *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, ICC-01/04-01/10-1, ¶¶ 8, 29 (Pre-Trial Chamber I, 28 September 2010).

²³⁸ *The Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, ¶ 14 (Pre-Trial Chamber I, 16 December 2011).

²³⁹ *Id.* ¶¶ 15-16.

²⁴⁰ *The Prosecutor v. Callixte Mbarushimana*, Decision on Issues Relating to Disclosure, ICC-01/04-01/10-87, ¶ 9 (Pre-Trial Chamber I, 30 March 2011).

²⁴¹ See, e.g., *The Prosecutor v. Callixte Mbarushimana*, Decision on "Defense Request to Deny the Use of Certain Incriminating Evidence at the Confirmation Hearing" and Postponement of Confirmation Hearing, ICC-01/04-01/10-378, ¶ 15 (Pre-Trial Chamber I, 16 August 2011).

²⁴² *The Prosecutor v. Callixte Mbarushimana*, Decision on the "Defense Request to Exclude the Prosecution's Amended Document Containing the Charges and Amended List of Evidence," ICC-01/04-01-10-306, at 4 (Pre-Trial Chamber I, 22 July 2011).

²⁴³ *Id.* at 5-6.

²⁴⁴ *Id.* at 7.

around ten extra pages of material, from the record.²⁴⁵ The second delay was brought about by fact that the Prosecution did not properly disclose audio files and transcripts of witness statements in a language that Mr. Mbarushimana understood,²⁴⁶ and then the Defense waited until nine days before the start of the confirmation hearing to raise the matter with the Chamber.²⁴⁷ The Chamber was forced to delay proceedings by one month to allow the Prosecutor more time to properly disclose the evidence in a language that the suspect could understand.²⁴⁸

The confirmation hearing was held from 16 to 21 September 2011.²⁴⁹ Neither the Defense nor the Prosecution called any live witnesses during the hearing.²⁵⁰

On 16 December 2011, the Pre-Trial Chamber issued a decision holding there were not substantial grounds to believe that Mr. Mbarushimana could be held criminally liable for the charges alleged by the Prosecutor.²⁵¹ Ultimately, the Chamber struggled with the lack of consistent and sufficient evidence to establish the commission of a majority of the individual attacks alleged by the Prosecutor,²⁵² as well as Mr. Mbarushimana's nexus to the charged crimes.²⁵³ Specifically, regarding the individual attacks alleged by the Prosecutor, the Chamber stressed it "had serious difficulties in determining, or could

²⁴⁵ *Id.*

²⁴⁶ *The Prosecutor v. Callixte Mbarushimana*, Decision on "Defense Request to Deny the Use of Certain Incriminating Evidence at the Confirmation Hearing" and Postponement of Confirmation Hearing, ICC-01/04-01/10-378, ¶¶ 20-22 (Pre-Trial Chamber I, 16 August 2011) (condemning the Prosecution's practice of promising full transcripts in Kinyarwanda when the Prosecution did not have those transcripts created, nor intended to create them).

²⁴⁷ *Id.* ¶ 19 (noting that the Defense was aware of the issue as early as 28 June 2011, yet did not raise its claim until 8 August 2011).

²⁴⁸ *Id.* ¶ 24.

²⁴⁹ *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 238, ¶ 32.

²⁵⁰ *The Prosecutor v. Callixte Mbarushimana*, Defence Response to the Order Requesting Views and Proposals on the Schedule for the Confirmation Hearing, ICC-01/04-01/10, ¶ 2 (Pre-Trial Chamber I, August 4 2011); *The Prosecutor v. Callixte Mbarushimana*, Prosecution's Views and Proposals on the Schedule of the Confirmation Hearing and Application to Bar the Testimony of a Defence Expert If Essential Documentation Is Not Provided, ICC-01/04-01/10, ¶ 2 (Pre-Trial Chamber I, 4 August 2011).

²⁵¹ *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 238, ¶ 31.

²⁵² *Id.* ¶¶ 110, 264.

²⁵³ *Id.* ¶ 333.

not determine at all, the factual ambit of a number of the charges.”²⁵⁴ For example, under Count 1 (attacking civilians) of the charges section of the Document Containing the Charges, the Prosecutor named twenty-two different attacks, but, in the pertinent part of the DCC, only provided the factual description of seven attacks.²⁵⁵ Similarly, Count 3 charged twelve different instances of murder, but the factual allegations only supported four of those murders.²⁵⁶ The Chamber further found, in nearly a dozen instances, that charges that were sufficiently described in the DCC were supported by evidence that was “so scant” the Chamber could not properly assess or make a determination on whether the charged crimes were committed by the FDLR.²⁵⁷ While the Chamber did find that the FDLR committed war crimes in five of the twenty-five occasions submitted by the Prosecutor,²⁵⁸ it found that “the little evidence” put forward by the Prosecution to support the suspect’s responsibility for these was “either too limited or too inconsistent.”²⁵⁹ Moreover, the Chamber “stress[ed] the lack of *any suggestion* that Mr. Mbarushimana was bestowed with the power to exercise any form of authority over FDLR commanders.”²⁶⁰

The Prosecution subsequently obtained leave to appeal the Pre-Trial Chamber’s decision, raising the issues, *inter alia*, of whether the burden of proof applied by the Chamber was too high and whether it incorrectly assessed the credibility of the Prosecution’s witnesses.²⁶¹ The Appeals Chamber dismissed the appeal, holding that the Pre-Trial Chamber may evaluate ambiguities, inconsistencies, and contradictions in the evidence without applying too high a burden on the Prosecutor.²⁶² The Appeals Chamber further reminded the

²⁵⁴ *Id.* ¶ 110.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* ¶ 113.

²⁵⁸ *Id.* at 264.

²⁵⁹ *Id.* ¶ 333.

²⁶⁰ *Id.* ¶ 297 (emphasis added).

²⁶¹ *The Prosecutor v. Callixte Mbarushimana*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision on the Confirmation of Charges,’” ICC-01/04-01/10-487 (Pre-Trial Chamber I, 1 March 2012) (granting the Prosecution leave to appeal three out of the four alleged errors for appeal).

²⁶² *The Prosecutor v. Callixte Mbarushimana*, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the Confirmation of Charges,” ICC-01/04-01/10-514, ¶¶ 46, 47 (Appeals Chamber, 30 May 2012).

Prosecution that “the investigation should largely be completed at the stage of the confirmation of charges hearing,” although it also emphasized that “the Prosecutor need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe.”²⁶³

H. The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang

In the first of the two contentious Kenya cases, the Prosecutor charged William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang with committing crimes against humanity during the 2007 Kenyan post-election violence.²⁶⁴ All three suspects made their initial appearance, following an issuance of a summons to appear for each, on 7 April 2011.²⁶⁵

1. The Confirmation Process

In an attempt to be proactive on the potential issues surrounding disclosure, Judge Ekaterina Trendafilova, acting as Single Judge in the proceedings leading up to the confirmation hearing, set forth a disclosure regime before any of the suspects made his initial appearance.²⁶⁶ Notably, the Chamber returned to the *Bemba* system of disclosure, mandating that the Prosecution disclose to the Defense all potentially exculpatory evidence and that “all evidence disclosed between the parties... be communicated to the Chamber, regardless of whether the parties intend to rely on or present the said evidence at the

²⁶³ *Id.* ¶ 46.

²⁶⁴ *The Prosecutor v. William Samoei Ruto, et al.*, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-01 (Pre-Trial Chamber II, 8 March 2011).

²⁶⁵ *Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 33, ¶ 4.

²⁶⁶ *The Prosecutor v. William Samoei Ruto, et al.*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-01/09-01/11-44 (Pre-Trial Chamber II, 6 April 2011). *See also The Prosecutor v. William Samoei Ruto, et al.*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’ (ICC-01/09-01/11-44),” ICC-01/09-01/11-74 (Pre-Trial Chamber II, 2 May 2011) (denying the Prosecutor’s application for leave to appeal the decision on disclosure, which alleged that the Chamber was unfairly prejudicing the proceedings).

confirmation hearing.”²⁶⁷ Although the Prosecution sought to appeal the decision setting forth this regime, the request for leave to appeal was denied by the Pre-Trial Chamber²⁶⁸ and the Office of the Prosecutor largely complied with the relevant deadlines.²⁶⁹ Over the course of the period leading up to the confirmation hearing, “several thousand pages” of evidence were disclosed and communicated to the Chamber.²⁷⁰

The Single Judge also sought to streamline proceedings by limiting the number of *viva voce* witnesses each party could present during the confirmation hearing.²⁷¹ Thus, although the three Defense teams had originally planned to call forty-three witnesses in total, they were ultimately limited to two witnesses each, while the Prosecution chose not to call any.²⁷² The confirmation of charges hearing took place on schedule on 1 September 2011 and lasted until 8 September 2011.²⁷³

On 23 January 2012, the Pre-Trial Chamber issued a decision finding there were substantial grounds to believe that Mr. Ruto was responsible as an indirect co-perpetrator for three counts of crimes against humanity and that Mr. Sang contributed to the commission of the same crimes.²⁷⁴ Conversely, the Chamber determined that there were not substantial grounds to believe that Mr. Kosgey could be held criminally liable for crimes against humanity, stressing that the

²⁶⁷ *Ruto, et al.*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, *supra* n. 266, ¶ 6.

²⁶⁸ *Ruto, et al.*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’ (ICC-01/09-01/11-44),” *supra* n. 266.

²⁶⁹ Indeed, it appears the Prosecution only requested one extension to the disclosure calendar. See *The Prosecutor v. William Samoei Ruto, et al.*, Decision on the “Prosecution’s Request for Extension of the Third Disclosure Deadline of 8 July 2011” (Pre-Trial Chamber II, 4 July 2011) (granting the Prosecution a five-day extension in relation to the disclosure of three witness statements).

²⁷⁰ *Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 33, ¶ 10.

²⁷¹ *The Prosecutor v. William Samoei Ruto, et al.*, Order to the Defence to Reduce the Number of Witnesses to be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, ICC-01/09-01/011 (Pre-Trial Chamber II, 25 July 2011).

²⁷² *Id.* See also *Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 33, ¶ 14.

²⁷³ *Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 33, ¶ 18.

²⁷⁴ *Id.* ¶¶ 349, 367.

Prosecution had only put forward one anonymous witness to testify to Mr. Kosgey's involvement within the organization allegedly responsible for the commission of the crimes.²⁷⁵

Following the decision confirming the charges against Messrs. Ruto and Sang, both sought leave to appeal the decision, but the Pre-Trial Chamber rejected the request.²⁷⁶ Thus, on 29 March 2012, the Presidency constituted Trial Chamber V and referred to it the case against Messrs. Ruto and Sang.²⁷⁷

2. Trial Chamber's Decision Invoking Regulation 55

Two months prior to the start of trial in the *Ruto & Sang* case, the Prosecution filed a submission requesting that the Trial Chamber give notice to the parties that it may invoke Regulation 55 to change the legal characterization of Mr. Ruto's criminal responsibility from that of an indirect co-perpetrator to one of several other forms of liability under Article 25(3) of the Rome Statute.²⁷⁸ The Prosecution urged the Trial Chamber to provide this notice as early as possible to ensure the fairness of the trial and permit the Defense to present evidence regarding all potential forms of liability.²⁷⁹

In response to the Prosecution's submission, Ruto's Defense team argued that the Prosecution's request was "too hypothetical" and that it was based on an improper understanding of Regulation 55.²⁸⁰

²⁷⁵ *Id.* ¶ 293 (noting further that anonymous witnesses are treated with a lower probative value and require more corroboration to be credible).

²⁷⁶ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision of the Defenses' Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-399, at 22 (Pre-Trial Chamber II, 9 March 2012).

²⁷⁷ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision Constituting Trial Chamber V and Referring to it the Case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-406 (Presidency, 29 March 2012).

²⁷⁸ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution's Submissions on the Law of Indirect Co-Perpetration under Article 25(3)(a) of the Statute and Application for Notice to Be Given Under Regulation 55(2) With Respect to William Samoei Ruto's Individual Criminal Responsibility, ICC-01/01-01/11-433 (Office of the Prosecutor, 3 July 2012).

²⁷⁹ *Id.* ¶ 41 (arguing advanced knowledge will only help the accused and advance the interests of a fair trial).

²⁸⁰ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Defense Response to the Prosecution's Submissions on the Law of Indirect Co-Perpetration

Stressing the right of the accused to be informed promptly and in detail of the charges against him, the Defense argued the Chamber “should be vigilant in ensuring that Mr. Ruto is not subjected to uncertainty as to the mode in which he is alleged to have participated in the crimes,” and that therefore it should reject the Prosecution’s request.²⁸¹

The Prosecution’s request remained pending when the trial commenced on 10 September 2013.²⁸² However, two months later, on 12 December 2013, the Trial Chamber issued a decision consistent with the request, providing notice that pursuant to Regulation 55(2), there was a possibility that the legal characterization of the facts relating to Mr. Ruto’s alleged criminal responsibility could change.²⁸³ The Chamber reassured the parties that the Defense would be given the opportunity to argue that any proposed legal re-characterization would exceed the scope of the confirmed charges.²⁸⁴ Yet at the time of issuing its decision, the Chamber did not provide any further details regarding the nature of the potential re-characterization, saying only that “there is a possibility that the legal characterisation of the facts... may be subject to change to accord with Article 25(3)(b), (c), or (d)” of the Rome Statute.²⁸⁵

As of the time of this writing, the *Ruto & Sang* trial is ongoing and there have been no other developments regarding the potential re-characterization of the facts.

3. “No Case to Answer” Procedure

Two weeks after setting the start date for trial, the Trial Chamber issued an order requesting submissions from the parties and participating victims on a number of issues, including “whether ‘no

under Article 25(3)(a) of the Statute and Application for Notice to Be Given Under Regulation 55(2) With Respect to William Samoei Ruto’s Individual Criminal Responsibility, ICC-01/09-01/11-442 (Defense, 24 July 2012).

²⁸¹ *Id.* ¶ 38.

²⁸² *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Hearing (Open Session), ICC-01/09-01/11-T-27-ENG ET WT 10-09-2013 1-83-SZ T (Transcript, 10 September 2013).

²⁸³ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, ICC-01/09-01/11-1122, at 20 (Trial Chamber V(a), 12 December 2013).

²⁸⁴ *Id.* ¶ 37.

²⁸⁵ *Id.* at 20.

case to answer' motions requesting dismissal of one or more counts at the conclusion of the Prosecution's case should be allowed in the case."²⁸⁶ In response, both of the parties and the participating victims welcomed the Chamber's proposed "no case to answer" procedure.²⁸⁷ On 9 August 2013, the Trial Chamber decided to allow, "in principle" the Defense teams to file a "no case to answer" motion at the close of the Prosecution's case.²⁸⁸ The Chamber instructed the parties that it would elaborate on the reasoning, further instructions, and applicable legal standard in a future ruling.²⁸⁹ That ruling came on 3 June 2014.²⁹⁰ Relying on Articles 66(1) and 67(1) of the Rome Statute,²⁹¹ the Trial Chamber explained that it had the right to hear a "no case to answer" motion out of the fundamental protections for the accused.²⁹² The Chamber specifically acknowledged that the Rome Statute and Rules of Procedure and Evidence are silent on the matter, but noted that Article 64(3)(a) and Rule 134 grant the Chamber the ability to

²⁸⁶ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Order Requesting Submissions on the Conduct of the Proceedings, ICC-01/09-01/11-778, ¶ 2(v) (Trial Chamber V(a), 19 June 2013).

²⁸⁷ See, e.g., *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution Submissions on the Conduct of the Proceedings, ICC-01/09-01/11-794, ¶ 7 (Trial Chamber V(a), 3 July 2013); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Defense Submissions on the Conduct of the Proceedings, ICC-01/09-01/11-795, ¶¶ 12-18 (Trial Chamber V(a), 3 July 2013); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Sang Defense Submissions on the Conduct of the Proceedings, ICC-01/09-01/11-796, ¶ 10 (Trial Chamber V(a), 3 July 2013); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Submissions of the Common Legal Representative for Victims Pursuant to the "Order Requesting Submissions on the Conduct of Proceedings" Issued on 19 June 2013, ICC-01/09-01/11-797, ¶¶ 3-5 (Trial Chamber V(a), 3 July 2013).

²⁸⁸ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Conduct of Trial Proceedings (General Directions), ICC-01/09-01/11-847, ¶ 32 (Trial Chamber V(a), 9 August 2013).

²⁸⁹ *Id.*

²⁹⁰ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), ICC-01/09-01/11-1334 (Trial Chamber V(a), 3 June 2014).

²⁹¹ Article 66(1) of the Rome Statute states that "[e]veryone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law." Rome Statute, *supra* n. 2, Art. 66(1). Article 67(1) states, in part, that "[i]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute [and] to a fair hearing conducted impartially," and it also includes a list of "minimum guarantees" to which the accused is entitled, including the right to be tried without undue delay. *Id.* Art. 67(1).

²⁹² *Ruto & Sang*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), *supra* n. 290, ¶ 12.

instill “procedures as are necessary to facilitate the fair and expeditious conduct of the proceeding” and decide “any issue concerning the conduct of the proceeding,” respectively.²⁹³ In fact, the Chamber determined that it was under a general obligation to conduct the trial procedures in a manner that is fair and expeditious.²⁹⁴

In its decision, the Chamber also discussed the relationship between the confirmation of charges and the “no case to answer” proceeding.²⁹⁵ The Chamber concluded that, even though the confirmation of charges serves to filter cases without merit, given its lower evidentiary standard, limited evidentiary scope, and distinct rules related to that stage, it does not preclude the use of a “no case to answer” motion at the end of the Prosecution’s presentation of evidence.²⁹⁶ Further, the Chamber noted that the nature and content of the Prosecution’s evidence may change over the course of time and the Prosecution does not need to introduce the same evidence at trial as in the confirmation stage.²⁹⁷

Regarding the relevant standard, the Chamber concluded that it would assess “whether or not, on the basis of a *prima facie* assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which if accepted, a reasonable Trial Chamber *could* convict the accused.”²⁹⁸ Moreover, the Chamber indicated that it will not evaluate the strength of the evidence in terms of credibility or reliability because these assessments must be made in light of the entirety of the evidence presented.²⁹⁹ The Chamber will only consider the evidence that has been “submitted and discussed” at trial and found to be admissible when considering a “no case to answer” proceeding.³⁰⁰ Ultimately, the Chamber will determine “whether there is evidence on which a reasonable Trial Chamber could convict” the accused, looking at each count in the Document Containing the

²⁹³ *Id.* ¶ 15.

²⁹⁴ *Id.* ¶ 16.

²⁹⁵ *Id.* ¶ 14.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* ¶ 23.

²⁹⁹ *Id.* ¶ 24.

³⁰⁰ *Id.* ¶ 25.

Charges, but not analyzing credibility unless the evidence presented is “incapable of belief by any reasonable” Chamber.³⁰¹

4. *Continued Disclosure*

Despite being well into the Prosecution’s case-in-chief and over a year and a half since the commencement of trial, the Prosecution is still disclosing evidence to the defense. From 12 January to 10 April 2015, the Prosecution disclosed 704 items of evidence.³⁰²

I. **The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali**

In the second Kenya case, the Prosecutor charged Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali with committing crimes against humanity during the 2007 Kenyan post-election violence.³⁰³ All three suspects made their initial appearance pursuant to summonses to appear on 8 April 2011.³⁰⁴ As of 27 August 2015, the Prosecution was still disclosing evidence.³⁰⁵

³⁰¹ *Id.* ¶ 32.

³⁰² *See, e.g., The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution’s Communication of the Disclosure of Evidence, ICC-01/09-01/11-1853 (Trial Chamber V(a), 10 April 2015); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution’s Communication of the Disclosure of Evidence, ICC-01/09-01/11-1846 (Trial Chamber V(a), 23 March 2015); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution’s Communication of the Disclosure of Evidence, ICC-01/09-01/11-1836 (Trial Chamber V(a), 10 March 2015); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution’s Communication of the Disclosure of Evidence, ICC-01/09-01/11-1805 (Trial Chamber V(a), 4 February 2015); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution’s Communication of the Disclosure of Evidence, ICC-01/09-01/11-1777 (Trial Chamber V(a), 12 January 2015).

³⁰³ *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Decision on the Prosecutor’s Application For Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-1 (Pre-Trial Chamber II, 8 March 2011).

³⁰⁴ *Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 33, ¶ 4.

³⁰⁵ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution’s Communication of the Disclosure of Evidence, ICC-01/09-01/11-1941 (Trial Chamber V(A), 27 August 2015).

1. *The Confirmation Process*

Single Judge Trendafilova set up a disclosure system identical to that used in *Ruto, et al.*,³⁰⁶ setting the stage for the disclosure of some 14,640 pages of evidence for the purposes of the decision whether to confirm the charges, all of which was also shared with the Chamber.³⁰⁷ The confirmation hearing took place as initially scheduled between 21 September 2011 and 5 October 2011.³⁰⁸ As in the *Ruto, et al.* case, each Defense team called two live witnesses during the hearing, while the Prosecution refrained from calling any.³⁰⁹

On 23 January 2012, the Pre-Trial Chamber confirmed the charges against Messrs. Muthaura and Kenyatta, finding that there were substantial grounds to believe that they were criminally liable as indirect co-perpetrators for five counts of crimes against humanity.³¹⁰ However, the Chamber declined to confirm any of the charges against Mr. Ali, who was Commissioner of the Kenya Police during the time of the alleged crimes.³¹¹ Specifically, the Chamber found that the Prosecution failed to substantiate its claim that Mr. Ali was criminally responsible for the inaction of the Kenya Police in the face of crimes against humanity because the evidence did not sufficiently establish that “there existed an identifiable course of conduct of the Kenya Police amounting to participation, by way of inaction” in the relevant crimes.³¹² As in the other cases in which a Chamber declined to confirm charges, the Pre-Trial Chamber cited only to the evidence put forward by the Prosecutor in establishing that the evidence was insufficient to support the charges, as opposed to relying on countervailing evidence put forward by the Defense.³¹³ In particular, the Chamber determined that, while reliable, the Prosecutor’s *own evidence* revealed that any failings on the part of the police to prevent the violence that occurred in 2007 “mainly occurred as a result of

³⁰⁶ *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-01/09-02/11-48 (Pre-Trial Chamber II, 6 April 2011).

³⁰⁷ *Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 33, ¶ 10.

³⁰⁸ *Id.* ¶ 16.

³⁰⁹ *Id.* ¶ 13.

³¹⁰ *Id.* ¶ 428.

³¹¹ *Id.* ¶ 430.

³¹² *Id.* ¶ 425.

³¹³ *Id.* ¶¶ 225-26.

ethnic bias on the part of individual police officers as well as of ineptitude and failure of senior police officers to sufficiently appreciate the violence in [the relevant areas], leaving the police officers on the ground often overwhelmed and outnumbered by the attackers.”³¹⁴

As in *Ruto, et al.* case, the Chamber denied requests from both Messrs. Muthaura and Kenyatta for leave to appeal the confirmation decision.³¹⁵ The case was thus transferred to the Trial Chamber V on 29 March 2012,³¹⁶ and reassigned to Trial Chamber V(b) on 21 May 2013 following Judge Ozaki’s request to be excused from the *Ruto & Sang* case.³¹⁷

2. *Prosecution’s Request for Notification Under Regulation 55*

As in the other Kenya case, prior to the scheduled start of the trial, the Prosecution requested that the Trial Chamber provide the accused notice under Regulation 55.³¹⁸ Specifically, the Prosecution requested that notice be given that both the mode of liability may be subject to change – again requesting that the accused be put on notice that the Chamber may characterize his responsibility under *any* of the subparagraphs of Article 25(3)³¹⁹ – and that certain facts may be re-

³¹⁴ *Id.* ¶ 226.

³¹⁵ *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the Defense Applications for Leave to Appeal the Decision on the Confirmation of Charges, ICC-01/09-02/11-406 (Pre-Trial Chamber II, 9 March 2012).

³¹⁶ *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision Constituting Trial Chamber V and Referring to it the Case of The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, ICC-01/09-02/11-414 (Presidency, 29 March 2012).

³¹⁷ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision Constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-739 (Presidency, 21 May 2013).

³¹⁸ *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution’s Submissions on the Law of Indirect Co-Perpetration under Article 25(3)(a) of the Statute and Application for Notice to Be Given under Regulation 55(2) With Respect to the Accuseds’ Individual Criminal Responsibility, ICC-01/09-01/11-444 (Office of the Prosecutor, 3 July 2012).

³¹⁹ *Id.* ¶¶ 26-31.

characterized as different crimes.³²⁰ The Trial Chamber had yet to respond to the Prosecution's request when other events rendered the request moot, as discussed immediately below.

3. *The Withdrawal of Charges Against the Accused*

On 18 March 2013, the Prosecutor withdrew the charges against Mr. Muthaura after concluding that, due to a number of factors, it would not be able to prove the allegations from the confirmation of charges beyond a reasonable doubt against Mr. Muthaura.³²¹ The trial against Mr. Kenyatta alone was scheduled to commence on 7 October 2014.³²² However, on 5 September 2014, the Prosecution requested an adjournment of proceedings against Mr. Kenyatta, citing a lack of cooperation on the part of the Kenyan government with respect to the Prosecution's request for records.³²³ The Prosecutor indicated that, without the records, it did not possess sufficient evidence to support a criminal conviction beyond a reasonable doubt.³²⁴ After hearing from the Prosecution, the Defense, and the Kenyan government, the Trial Chamber determined that the Prosecution failed to establish obstruction on the part of the government and denied the request for adjournment.³²⁵ In light of this decision, on 5 December 2014, the Prosecutor withdrew the charges against Mr. Kenyatta.³²⁶

³²⁰ *Id.*

³²¹ *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura, ICC-01/09-02/11-687, ¶ 9 (Office of the Prosecutor, 11 March 2013). Specifically, the factors cited by the Prosecution in support of its decision included the lack of cooperation by the Government of Kenya, the recantation of a crucial witness against Mr. Muthaura, and various issues confronting witnesses, like individuals unwilling to testify or provide evidence to the Prosecution, the death of witnesses since the 2007 post-election violence, and several witnesses accepting bribes from individuals representing themselves as representatives of both accused. *Id.* ¶ 11.

³²² *The Prosecutor v. Uhuru Muigai Kenyatta*, Prosecution Notice Regarding the Provisional Trial Date, ¶ 1 (Office of the Prosecutor, 5 September 2014).

³²³ *Id.* ¶ 4.

³²⁴ *Id.* ¶ 2.

³²⁵ *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's Application for a Further Adjournment, ICC-01/09-02/11-981, ¶ 53 (Trial Chamber V(b), 3 December 2014).

³²⁶ *The Prosecutor v. Uhuru Muigai Kenyatta*, Notice of Withdrawal of the Charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11-983 (Trial Chamber V(b), 5 December 2014). *See also The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on

J. The Prosecutor v. Bosco Ntaganda

Bosco Ntaganda was initially charged with committing three counts of the war crime of recruiting children under the age of fifteen.³²⁷ Subsequently, the Prosecution obtained a second warrant, adding three counts of crimes against humanity and four new counts of war crimes to the case.³²⁸ Mr. Ntaganda was allegedly the Deputy Chief of Staff in charge of operations with the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* and responsible for attacks in the Ituri region of the DRC.³²⁹ He was on the run for over six years, but ultimately surrendered to the Court and made his initial appearance on 26 March 2013.³³⁰

The confirmation hearing in the case against Mr. Ntaganda was initially scheduled to begin on 23 September 2013, approximately six months after the suspect's first appearance before the Court.³³¹ However, shortly after Single Judge Trendafilova established a disclosure calendar in accordance with the anticipated confirmation hearing,³³² the Prosecution moved to have the hearing postponed on the grounds that, because Mr. Ntaganda had been a fugitive for so

the Prosecution's Application for a Further Adjournment, ICC-01/09-02/11-981, ¶ 57 (Trial Chamber V(b), 3 December 2014) (denying the Prosecution's request to further adjourn proceedings against Mr. Kenyatta).

³²⁷ *The Prosecutor v. Bosco Ntaganda*, Warrant of Arrest, ICC-01/04-02/06-2-Anx-tENG, at 4 (Pre-Trial Chamber I, 22 August 2006).

³²⁸ *The Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor's Application under Article 58, ICC-01/04-02/06-36-Red (Pre-Trial Chamber II, 13 July 2012).

³²⁹ *The Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, ¶ 15 (Pre-Trial Chamber II, 9 June 2014).

³³⁰ *Id.* ¶ 2.

³³¹ *The Prosecutor v. Bosco Ntaganda*, Decision on the "Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing" and Setting a New Calendar for the Disclosure of Evidence Between the Parties, ICC-01/04-02/06-73, ¶ 3 (Pre-Trial Chamber II, 17 June 2013).

³³² The Single Judge implemented the same disclosure protocol used in the Kenya cases, meaning that all evidence disclosed between the parties was also shared with the Chamber, regardless of whether the parties intended to rely on or present the said evidence at the confirmation hearing. *See The Prosecutor v. Bosco Ntaganda*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-01/04-02/06-47, ¶¶ 10, 33 (Pre-Trial Chamber II, 12 April 2013).

long, the original case had been “hibernated.”³³³ The Prosecution also noted that it had gathered over 43,276 documents in its investigation into the alleged crimes committed in Ituri and therefore could not possibly meet the Single Judge’s disclosure deadlines.³³⁴ Finally, the Prosecution acknowledged that, despite applying for warrants of arrest and having “completed significant analysis and investigation into the charges,” the investigation against Mr. Ntaganda was still not complete.³³⁵ The Single Judge granted the Prosecution’s request over the objection of the Defense and rescheduled the confirmation hearing for 10 February 2014.³³⁶ The hearing lasted four days.³³⁷

On 9 June 2014, the Pre-Trial Chamber issued a decision concluding that there were substantial grounds to believe Mr. Ntaganda was liable, either through indirect co-perpetration, direct perpetration, ordering, inducing, contributing, or under command responsibility for eighteen counts of war crimes and crimes against humanity.³³⁸ However, the Chamber could not conclude that there were substantial grounds to believe Mr. Ntaganda was liable as a direct co-perpetrator.³³⁹ On 18 July 2014, the Presidency constituted Trial Chamber VI to hear the case.³⁴⁰ The trial was initially slated to begin on 2 June 2015,³⁴¹ but was postponed to 2 September 2015.³⁴²

³³³ *The Prosecutor v. Bosco Ntaganda*, Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing, ICC-01/04-02/06-65, ¶¶ 14-15 (Office of the Prosecutor, 23 May 2013).

³³⁴ *Id.* ¶ 16.

³³⁵ *Id.* ¶ 21.

³³⁶ *Ntaganda*, Decision on the “Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing” and Setting a New Calendar for the Disclosure of Evidence Between the Parties, *supra* n. 331, at 19.

³³⁷ *Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, *supra* n. 329, ¶ 5.

³³⁸ *Id.* ¶ 97.

³³⁹ *Id.*

³⁴⁰ *The Prosecutor v. Bosco Ntaganda*, Decision Constituting Trial Chamber VI and Referring to it the Case of *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-337 (Presidency, 18 July 2014).

³⁴¹ *The Prosecutor v. Bosco Ntaganda*, Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382-Corr ¶8 (Trial Chamber VI, 9 October 2014).

³⁴² See International Criminal Court Press Release, *Ntaganda Trial Opens at International Criminal Court*, ICC-CPI-20150902-PR1143 (2 September 2015).

K. The Prosecutor v. Laurent Gbagbo

Laurent Gbagbo is the former president of the Côte d'Ivoire and is charged with four counts of crimes against humanity committed against the supporters of current president Alassane Ouattara following the divisively contested 2010 presidential election.³⁴³ Mr. Gbagbo made his initial appearance on 5 December 2011.³⁴⁴

1. The Confirmation Process

The Pre-Trial Chamber decided to closely follow the disclosure regime established in the *Abu Garda* case.³⁴⁵ Judge Silvia Fernandez de Gurmendi ordered the Prosecution and Defense to share with the Chamber only the evidence that was to be presented during the confirmation hearing.³⁴⁶ Evidence that was disclosed via *inter partes* exchanges and not used during the confirmation hearing was not shared with the Chamber.³⁴⁷

The confirmation of charges hearing was initially scheduled for 18 June 2012,³⁴⁸ but on 5 June 2012, the Defense requested the hearing be delayed until at least 27 August 2012 on the grounds that Mr. Gbagbo was unfit to stand trial and the team lacked the necessary resources to adequately prepare for the hearing.³⁴⁹ While the Chamber did not find the suspect unfit to stand trial, it did recognize that the Defense had

³⁴³ *The Prosecutor v. Laurent Gbagbo*, Decision on the Confirmation of Charges Against Laurent Gbagbo, ICC-02/11-01/11-656-Red, ¶ 267 (Pre-Trial Chamber I, 12 June 2014). Following the confirmation of charges decision in *The Prosecutor v. Charles Blé Goudé*, on 11 March 2015, the two cases were joined. *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé*, Decision on Prosecution Requests to Join the Cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and Related Matters, ICC-02/11-01/11-810 and ICC-02/11-02/11-222, ¶ 74 (Trial Chamber I, 11 March 2015).

³⁴⁴ *The Prosecutor v. Laurent Gbagbo*, Decision Establishing a Disclosure System and a Calendar for Disclosure, ICC-02/11-01/11-30, ¶ 1 (Pre-Trial Chamber III, 24 January 2012).

³⁴⁵ *Id.* ¶ 13.

³⁴⁶ *Id.* ¶ 15.

³⁴⁷ *Id.*

³⁴⁸ *Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, *supra* n. 37, ¶ 3.

³⁴⁹ *The Prosecutor v. Laurent Gbagbo*, Decision on the “Requête de la Défense en report de l’audience de confirmation des charges prévue le 18 juin 2012,” ICC-02/11-01/11-152-Red, ¶¶ 4, 9-10 (Pre-Trial Chamber I, 12 June 2012).

unnecessary resources to allow it to prepare for the June 2012 hearing due to a delay in authorization of funds from the Registry.³⁵⁰ The Chamber therefore agreed to postpone the confirmation hearing to 13 August 2012.³⁵¹ The Defense team again raised the issue of Mr. Gbagbo's fitness to stand trial, however, and the hearing was once again delayed to allow the Chamber to resolve the question.³⁵² Finally, after extended filings between the parties, on 2 November 2012, the Chamber again determined that Mr. Gbagbo was fit to participate in the confirmation hearing.³⁵³ The hearing took place from 19 February through 28 February 2013.³⁵⁴ Neither the Prosecution nor the Defense called *viva voce* witnesses.³⁵⁵

On 3 June 2013, while its decision on confirmation was still pending, a majority of the Chamber adjourned the proceedings pursuant to Article 61(7)(c)(i) of the Rome Statute,³⁵⁶ which permits the Chamber to request that the Prosecutor "consider providing further evidence on a particular charge or amending a charge" presented at the hearing.³⁵⁷ The Chamber was particularly concerned with the Prosecution's heavy reliance on hearsay evidence contained in reports from non-governmental organizations and press articles, stating "whenever testimonial evidence is offered, it should, to the extent possible, be

³⁵⁰ *Id.* ¶¶ 28-29, 36, 40.

³⁵¹ *Id.* at 12.

³⁵² *The Prosecutor v. Laurent Gbagbo*, Decision on Issues Related to the Proceedings under Rule 135 of the Rules of Procedure and Evidence and Postponing the Date of the Confirmation of Charges Hearing, ICC-02/11-01/11-201, 8 (Pre-Trial Chamber I, 2 August 2012).

³⁵³ *The Prosecutor v. Laurent Gbagbo*, Decision on the Fitness of Laurent Gbagbo to Take Part in the Proceedings before this Court, ICC-02/11-01/11-286-Red, ¶ 101 (Pre-Trial Chamber I, 2 November 2012); .

³⁵⁴ *Gbagbo*, Decision on the Confirmation of Charges Against Laurent Gbagbo, *supra* n. 343, ¶ 8.

³⁵⁵ *The Prosecutor v. Laurent Gbagbo*, Decision on the "Requête de la Défense du Président Gbagbo en vue d'une prorogation de délais pour la soumission d'informations relatives à la présentation de témoignages *viva voce* lors de l'audience de confirmation des charges", ICC-02/11-01/11-115, ¶ 5 (Pre-Trial Chamber I, 15 May 2012). *See also The Prosecutor v. Laurent Gbagbo*, Prosecution's Observations on the Schedule of the Confirmation of Charges Hearing, ICC-02/11-01/11-113 (Pre-Trial Chamber I, 14 May 2012); *The Prosecutor v. Laurent Gbagbo*, Observations de la Défense concernant le calendrier de l'audience de confirmation des charges, ICC-02/11-01/11-128, ¶ 18 (Pre-Trial Chamber I, 23 May 2012).

³⁵⁶ *See generally Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, *supra* n. 37.

³⁵⁷ Rome Statute, *supra* n. 2, Art. 61(7)(c).

based on the first-hand and personal observations of the witness.”³⁵⁸ Further, the Chamber expressed its concern that its ability to assess the credibility of witnesses would be reduced due to the Prosecution’s reliance on documentary and summary evidence instead of in-person testimony, and requested that the Prosecutor provide further evidence and investigation with regards to six sets of factual allegations underlying the charges against Mr. Gbagbo.³⁵⁹ It also ordered the Prosecution to submit an amended Document Containing the Charges that included the additional information sought by the Chamber no later than 15 November 2013.³⁶⁰ In justifying its decision, the Chamber cited to the Appeals Chamber’s holding in the *Mbarushimana* case that the Prosecution’s investigation should be largely completed at the time of the confirmation of charges, and extrapolated that the Prosecution should therefore present its “strongest possible case” for purposes of confirmation, submitting all the evidence it has gathered to the Pre-Trial Chamber.³⁶¹

Judge Sylvia Fernández de Gurmendi dissented from the majority decision, expressing her opinion that the Chamber was overstepping its mandate by requesting the Prosecutor to submit additional factual allegations.³⁶² She disagreed with the majority’s view of the applicable evidentiary standard, which, in her view, exceeded what was required by the Rome Statute.³⁶³ According to Judge Fernández de Gurmendi, the Pre-Trial Chamber’s role is merely to assess on the basis of the evidence presented to it whether there are substantial grounds to believe that crimes have been committed, rather than assess whether it has received all the evidence and/or has been presented with the Prosecution’s strongest possible case.³⁶⁴ Further, Judge Fernández de Gurmendi stated that the majority’s approach undermined the Prosecution’s ability to rely on documentary and summary evidence and frustrated the limited purpose of the confirmation of charges process.³⁶⁵ Finally, she warned that an “expansive interpretation” of the Pre-Trial Chamber’s role “affects the entire architecture of the

³⁵⁸ *Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, *supra* n. 37, ¶¶ 27, 29.

³⁵⁹ *Id.* ¶¶ 33, 44.

³⁶⁰ *Id.* at 23.

³⁶¹ *Id.* ¶ 25.

³⁶² *Id.* Dissenting Opinion of Judge Sylvia Fernández de Gurmendi, ¶¶ 50-51.

³⁶³ *Id.* Dissenting Opinion of Judge Sylvia Fernández de Gurmendi, ¶ 3.

³⁶⁴ *Id.* Dissenting Opinion of Judge Sylvia Fernández de Gurmendi, ¶ 21.

³⁶⁵ *Id.* Dissenting Opinion of Judge Sylvia Fernández de Gurmendi, ¶¶ 21-26.

procedural system of the Court and may, as a consequence, encroach upon the functions of trial Judges, generate duplications, and end up frustrating the judicial efficiency that Pre-Trial Chambers are called to ensure.”³⁶⁶

The Prosecutor applied for leave to appeal the adjournment decision on three issues: 1) whether the Chamber had incorrectly applied the standard of proof applicable at the confirmation stage; 2) whether each incident underlying the contextual elements of crimes against humanity must be established to the standard of proof embodied in Article 61(7) of the Rome Statute; and 3) whether the Pre-Trial Chamber has the authority to order the Prosecutor to amend the DDC by including additional facts.³⁶⁷ The Pre-Trial Chamber granted leave for appeal only for the second issue.³⁶⁸ It rejected the first issue on grounds that it was not formulated with sufficient clarity and did not arise from the adjournment decision as it was framed.³⁶⁹ Similarly, the third issue was rejected on grounds that it did not arise from the adjournment decision.³⁷⁰ The Appeals Chamber upheld the Pre-Trial Chamber’s decision to adjourn.³⁷¹ Specifically, the Appeals Chamber clarified that the impugned decision did not require that each of the incidents alleged by the Prosecution in support of the contextual elements be established to the standard of Article 61(7).³⁷² Rather, the Appeals Chamber noted language in the impugned decision stating that incidents underlying the contextual element of “attack against any civilian population” may be proven together to establish a *sufficient*

³⁶⁶ *Id.* Dissenting Opinion of Judge Sylvia Fernández de Grumendi, ¶ 26.

³⁶⁷ *The Prosecutor v. Laurent Gbagbo*, Decision on the Prosecutor’s and Defense Requests for Leave to Appeal the Decision Adjourning the Hearing on the Confirmation of Charges, ICC-02/11-01/11-464, ¶¶ 11, 27, 40 (Pre-Trial Chamber I, 31 July 2013).

³⁶⁸ *Id.* at 33. Again, Judge Fernández de Gurmendi dissented, arguing that the majority misinterpreted the parties’ arguments and would have granted their leaves for appeal on all grounds. *See generally id.* Dissenting Opinion of Judge Fernández de Gurmendi

³⁶⁹ *Id.* ¶ 19.

³⁷⁰ *Id.* ¶ 52.

³⁷¹ *The Prosecutor v. Laurent Gbagbo*, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 3 June 2013 entitled “Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute,” ICC-02/11-01/11-572, ¶¶ 47-48 (Appeals Chamber, 16 December 2013).

³⁷² *Id.* ¶ 47.

number of incidents and thus may collectively amount to the requisite standard under Article 61(7).³⁷³

Following the Appeals Chamber's decision, the Prosecution ultimately complied with the Pre-Trial Chamber's request and submitted an Amended Document Containing the Charges with additional evidence.³⁷⁴ However, due to the time consumed by the interlocutory appeal, the date of the revised submission was ultimately pushed back to 13 January 2014.³⁷⁵

On 12 June 2014 – two years, six months, and eight days after the suspect's initial appearance – a majority of the Pre-Trial Chamber confirmed part of the charges against Laurent Gbagbo, finding substantial grounds to believe that he was responsible for the charged crimes pursuant to Article 25(3) of the Rome Statute, although it declined to specify a particular prong of that provision.³⁷⁶ The Chamber refused to confirm the charges based on Mr. Gbagbo's responsibility under Article 28, finding that the evidence and the facts of the case, as understood by the Pre-Trial Chamber, did not support

³⁷³ *Id.* Note that the Prosecutor asserted two grounds of appeal in its brief to the Appeals Chamber: (i) "The Majority erred in requiring that in this case a sufficient number of Incidents underlying the contextual elements, including the 41 Incidents, must be established to the standard of proof enshrined in Article 61(7) and by applying that standard of proof to the subsidiary facts and evidence that relate to the 41 Incidents"; and (ii) "The Majority erred in its interpretation and application of the standard of proof under Article 61(7) of the Statute." *The Prosecutor v. Laurent Gbagbo*, Prosecution's Appeal against the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute," ICC-02/11-01/11-474, ¶ 6 (Office of the Prosecutor, 12 August 2013). However, the Appeals Chamber refused to consider the second ground of appeal, holding that it was an inappropriate attempt to introduce an issue for which leave to appeal was not granted by the Pre-Trial Chamber. *Gbagbo*, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute," *supra* n. 371, ¶¶ 56, 61.

³⁷⁴ *The Prosecutor v. Laurent Gbagbo*, Prosecution's Submission of Document amendé de notification des charges, l'Inventaire amendé des éléments de preuve à charge, and le Tableau amendé des éléments constitutifs des crimes, and Response to issues raised by Pre-Trial Chamber I, ICC-02/11-01/11-592 (Office of the Prosecutor, 13 January 2013).

³⁷⁵ *Id.* ¶ 3.

³⁷⁶ *See generally Gbagbo*, Decision on the Confirmation of Charges Against Laurent Gbagbo, *supra* n. 343.

this legal characterization.³⁷⁷ However, in doing so, the Chamber indicated that it “[could] not rule out the possibility that the discussion of the evidence at trial may lead to a different characterization of the facts.”³⁷⁸ Judge Christine Van den Wyngaert dissented from the decision confirming the charges, expressing the belief that the evidence remained insufficient to establish substantial grounds to believe Mr. Gbagbo is responsible for the charged crimes.³⁷⁹

On 11 September 2014, Mr. Gbagbo’s application for leave to appeal the confirmation decision was rejected, meaning the case could proceed to trial.³⁸⁰ Six days later, on 17 September 2014, President Sang-Hyun Song referred the case against Mr. Gbagbo to a re-constituted Trial Chamber I.³⁸¹

2. *Proceedings Before the Trial Chamber To Date*

Due to continuing disclosure and the possibility of a joinder with *The Prosecutor v. Blé Goudé* case,³⁸² on 17 November 2014, Trial Chamber I set the opening trial date for 7 July 2015, over three and half years since Mr. Gbagbo’s initial appearance.³⁸³ However, because

³⁷⁷ *Id.* ¶¶ 263-65.

³⁷⁸ *Id.*

³⁷⁹ See generally *id.* Dissenting Opinion of Justice Christine Van den Wyngaert.

³⁸⁰ *The Prosecutor v. Laurent Gbagbo*, Decision on the Defense Request for Leave to Appeal the “Decision on the Confirmation of Charges Against Laurent Gbagbo,” ICC-02/11-01/11-680 (Pre-Trial Chamber I, 11 September 2014).

³⁸¹ *The Prosecutor v. Laurent Gbagbo*, Decision Re-constituting Trial Chamber I and Referring To It the Case of *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-682 (The Presidency, 17 September 2014).

³⁸² The Prosecutor submitted a request to join the two cases on 22 December 2014, citing the similarity in facts between the two cases and claiming that joining the cases would minimize the impact of on witnesses, avoid duplication of evidence, promote judicial economy, and create consistent rulings regarding the evidence and issues. *The Prosecutor v. Charles Blé Goudé*, Prosecution’s Request to Join the Cases of *The Prosecutor v. Laurent GBAGBO* and *The Prosecutor v. Charles BLE GOUDÉ*, ICC-02/11-02/11-194 (Office of the Prosecutor, 22 December 2014).

³⁸³ See *The Prosecutor v. Laurent Gbagbo*, Order Setting the Commencement Date for the Trial and the Time Limit for Disclosure, ICC-02/11-01/11-723 (Trial Chamber I, 17 November 2014).

the *Gbagbo* and *Blé Goudé* cases were ultimately joined on 11 March 2015, the Chamber vacated the 7 July 2015 trial start date.³⁸⁴

On 24 April 2015, the Prosecutor filed a submission requesting that the Trial Chamber give notice to the parties that it may invoke Regulation 55 to change the legal characterization of Mr. Gbagbo's responsibility to command responsibility and superior responsibility under Article 28(a) and (b) of the Rome Statute.³⁸⁵ As stated above, this mode of responsibility had not been confirmed by the Pre-Trial Chamber, although that Chamber had foreseen the possibility that the Trial Chamber would re-characterize the facts.³⁸⁶ On 19 August 2015, Trial Chamber I issued a decision consistent with the Prosecution's request, notifying the parties that the legal characterization of the facts may be subject to change to include Mr. Gbagbo's liability under Articles 28(a) and 28(b) of the Rome Statute.³⁸⁷ Notably, in its decision, the Trial Chamber acknowledged that the Pre-Trial Chamber had declined to confirm charges under Article 28, and also noted that the Prosecution had not sought to appeal that decision or to amend the charges pursuant to Article 61(9) of the Rome Statute.³⁸⁸ Nevertheless, it concluded that, in this case, "the Prosecution's failure to exhaust other remedies does not impact on the Chamber's obligation to give notice under Regulation 55(2) of the Regulations."³⁸⁹

³⁸⁴ *Gbagbo & Blé Goudé*, Decision on Prosecution Requests to Join the Cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and Related Matters, *supra* n. 343, ¶ 74.

³⁸⁵ *The Prosecutor v. Laurent Gbagbo*, Prosecution Request for Notice to Be Given of a Possible Recharacterisation Pursuant To Regulation 55(2), ICC-02/11-01/15-43 (Trial Chamber I, 24 April 2015).

³⁸⁶ *Gbagbo*, Decision on the Confirmation of Charges Against Laurent Gbagbo, *supra* n. 343, ¶ 265.

³⁸⁷ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision Giving Notice Pursuant to Regulation 55(2) of the Regulations of the Court, ICC-02/11-01/15-185, ¶14 (Trial Chamber I, 19 August 2015).

³⁸⁸ *Id.* ¶ 8. Article 69(1) states, in relevant part: "After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held." Rome Statute, *supra* n. 2, Art. 61(9).

³⁸⁹ *Gbagbo & Blé Goudé*, Decision Giving Notice Pursuant to Regulation 55(2) of the Regulations of the Court, *supra* n. 387, ¶ 8.

The joint trial is currently scheduled to commence 10 November 2015.³⁹⁰

L. The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido

On 20 November 2014, the Prosecutor sought a warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido for allegedly committing offences against the administration of justice during the course of the *Bemba* case.³⁹¹ As discussed above, Jean-Pierre Bemba Gombo is currently on trial, accused of committing war crimes and crimes against humanity in the DRC.³⁹² Aimé Kilolo Musamba has acted as lead counsel for Mr. Bemba, with Jean-Jacques Mangenda Kabongo as case manager.³⁹³ Fidèle Babala Wandu is a DRC politician and close associate of Mr. Bemba, and Narcisse Arido served as a witness in the case and acted as an intermediary for the Defense team.³⁹⁴ Each of the five is charged with corruptly influencing a witness and falsifying evidence.³⁹⁵ Messrs. Bemba, Kilolo, and Babala made their initial appearances on 27 November 2013; Mr. Mangenda on 5 December 2013; and Mr. Arido on 20 March 2014.³⁹⁶

Early in the confirmation process, Judge Cuno Tarfusser, acting as the Single Judge, decided to forgo an oral confirmation hearing pursuant

³⁹⁰ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Order Setting the Commencement Date for Trial, ICC-02/11-01/15-58 (Trial Chamber I, 7 May 2015).

³⁹¹ *The Prosecutor v. Jean-Pierre Bemba Gombo, et al.*, Warrant of Arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO, ICC-01/05-01/13-1-Red2-tENG (Pre-Trial Chamber II, 20 November 2013).

³⁹² See *supra* n. 160 *et seq.* and accompanying text.

³⁹³ *The Prosecutor v. Jean-Pierre Bemba Gombo, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, ¶ 37 (Pre-Trial Chamber II, 11 November 2014).

³⁹⁴ *Id.* ¶ 37.

³⁹⁵ *Bemba, et al.*, Warrant of Arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO, *supra* n. 391.

³⁹⁶ *Bemba, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 393, ¶ 4.

to Rule 165(3) of the Rules of Procedure and Evidence,³⁹⁷ which states that a Pre-Trial Chamber may base its confirmation determination on written submissions alone in cases involving alleged offenses against the administration of justice.³⁹⁸ Initially, Judge Tarfusser set 18 April 2014 as the deadline to receive the written submissions from the Defense teams and Prosecution.³⁹⁹ However, this deadline was extended several times,⁴⁰⁰ largely due to a need to wait for the submission of a report by an Independent Counsel appointed by Judge Tarfusser in July 2013 to listen to recordings of phone calls conducted between Mr. Bemba and his counsel for purposes of “transmitting to the Prosecutor the relevant portions of any and all such calls which might be of relevance for the purposes of the investigation.”⁴⁰¹

³⁹⁷ Rule 165(3) provides that “for the purposes of article 61 the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.” ICC Rules, *supra* n. 29, R. 165(3).

³⁹⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo, et al.*, Trial Hearing (Open Session), ICC-01/05-01/13-T-1-ENG CT WT 27-11-2013 1-25 SZ PT, at 14-15 (Transcript, 27 November 2013).

³⁹⁹ *Id.* at 15.

⁴⁰⁰ *See, e.g., The Prosecutor v. Jean-Pierre Bemba Gombo, et al.*, Decision on the “Prosecution’s Request for Variation of Time Limits Pursuant to Regulation 35 of the Regulations of the Court Concerning the Confirmation of Charges” dated 3 March 2014, ICC-01/05-01/13-255 (Pre-Trial Chamber II, 14 March 2014); *The Prosecutor v. Jean-Pierre Bemba Gombo, et al.*, Decision Amending the Calendar for the Confirmation of the Charges, ICC-01/05-01/13-443, 5 (Pre-Trial Chamber II, 28 May 2014); *The Prosecutor v. Jean-Pierre Bemba Gombo, et al.*, Prosecution Request for Variation of Time Limit for Confirmation Response, ICC-01/05-01/13-608, ¶ 1 (Office of the Prosecutor, 4 August 2014).

⁴⁰¹ *See, e.g., Bemba, et al.*, Decision on the “Prosecution’s Request for Variation of Time Limits Pursuant to Regulation 35 of the Regulations of the Court Concerning the Confirmation of Charges” dated 3 March 2014, *supra* n. 400, at 7 (explaining that “the only ‘good cause’ shown by the Prosecutor in support of her request for postponement consists... of the persisting unavailability of the final report by Independent Counsel and that, accordingly, postponement should be strictly and precisely correlated with the need to ensure its availability to the Court and to the parties, in particular with a view to allowing the latter to peruse and include it, as appropriate, in the document containing the charges and in the other submissions to be prepared for the purposes of the confirmation of the charges in writing in lieu of hearing...”); *The Prosecutor v. Jean-Pierre Bemba Gombo, et al.*, Decision Amending the Calendar for the Confirmation of the Charges, ICC-01/05-01/13-443, at 4 (28 May 2014) (“Considering that, since Independent Counsel’s third and final report was made available to the parties almost four weeks later than expected at the time of the First Amendment Decision, it is appropriate that the calendar for the confirmation of the charges in writing be accordingly amended.”).

Ultimately, the Prosecution submitted its brief on 21 August 2014, and the Defense teams submitted their responses on 11 September 2014.⁴⁰²

The confirmation decision was released on 11 November 2014, over eleven months after the initial appearance of Messrs. Bemba, Kilolo, and Babala.⁴⁰³ In the decision, the Chamber confirmed the charges against all five suspects.⁴⁰⁴ On 23 January 2015, Judge Tarfusser rejected the Defense teams' requests for leave to appeal the confirmation of charges decision.⁴⁰⁵ On 30 January 2015, the Presidency constituted Trial Chamber VII to handle the *Bemba, et al.* case.⁴⁰⁶

The trial is currently set to start on 29 September 2015.⁴⁰⁷

M. The Prosecutor v. Charles Blé Goudé

Charles Blé Goudé, an Ivorian politician who served in the administration of Laurent Gbagbo, is charged with four counts of crimes against humanity allegedly committed on behalf of pro-Gbagbo forces following the contested 2010 election in Côte d'Ivoire.⁴⁰⁸ Although a warrant for his arrest was initially issued in December

⁴⁰² *Bemba, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 393, ¶¶ 5, 7 (“The calendar for the confirmation process was first set during the Initial Appearance and has since been amended three times. In particular, a postponement of about four months became unavoidable due to the time required by the Dutch authorities to make their own and Independent Counsel’s final reports on the intercepted communications available to the Court.”).

⁴⁰³ See generally *id.*

⁴⁰⁴ *Id.* at 47-54.

⁴⁰⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo, et al.*, Joint Decision on the Applications for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute,” ICC-01/05-01/13-801 (Pre-Trial Chamber II, 23 January 2015).

⁴⁰⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo, et al.*, Decision Constituting Trial Chamber VII and Referring to it the Case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13-805 (Presidency, 30 January 2015).

⁴⁰⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo, et al.*, Order setting the Commencement Date for Trial, ICC-01/05-01/13-960 (Trial Chamber VII, 22 May 2015).

⁴⁰⁸ *The Prosecutor v. Charles Blé Goudé*, Warrant of Arrest For Charles Blé Goudé, ICC-02/11-02/11-1 (Pre-Trial Chamber I, 21 December 2011).

2011, Mr. Blé Goudé evaded arrest for over two years, finally making his initial appearance before the ICC on 27 March 2014.⁴⁰⁹

The disclosure regime established by the Pre-Trial Chamber in the *Blé Goudé* case was similar to the disclosure regime in the *Gbagbo* case. Judge Fernandez de Gurmendi, again, ordered the Prosecution and Defense to share with the Chamber only the evidence that was to be presented during the confirmation hearing.⁴¹⁰ Since the *Blé Goudé* and *Gbagbo* cases are based on a similar set of facts, the Chamber authorized an expedited disclosure process in which the Prosecutor could disclose any potentially relevant evidence previously disclosed in the *Gbagbo* case and maintain the same previously authorized redactions.⁴¹¹

The Pre-Trial Chamber confirmed the charges against Mr. Blé Goudé just over eight months after his initial appearance,⁴¹² making his confirmation process the quickest at the ICC to date. Specifically, on 11 December 2014, Pre-Trial Chamber I confirmed all four charges, and one alternate charge,⁴¹³ against Mr. Blé Goudé.⁴¹⁴ As in the case against Laurent Gbagbo, the Chamber confirmed the charges with respect to multiple alternative modes of liability, finding there are substantial grounds to believe Mr. Blé Goudé can be criminally responsible under Article 25(3)(a) through (d) of the Rome Statute.⁴¹⁵ Arguably, the speedy confirmation could be attributed to the *Blé Goudé* and *Gbagbo* cases being litigated before the same judge and under the same set of facts. On 20 December 2014, the Presidency referred *Blé Goudé* to Trial Chamber I.⁴¹⁶

⁴⁰⁹ *The Prosecutor v. Charles Blé Goudé*, Decision on the Confirmation of Charges against Charles Blé Goudé, ICC-02/11-02/11-186 (Pre-Trial Chamber I, 11 December 2015).

⁴¹⁰ *The Prosecutor v. Charles Blé Goudé*, Decision Establishing a System for Disclosure of Evidence, ICC-02/11-02/11, ¶¶ 6-7 (Pre-Trial Chamber I, 11 December 2014).

⁴¹¹ *Id.*

⁴¹² *Blé Goudé*, Decision on the Confirmation of Charges against Charles Blé Goudé, *supra* n. 409, at 90.

⁴¹³ *Id.* ¶¶ 120, 182.

⁴¹⁴ *Id.* ¶¶ 184, 187-93.

⁴¹⁵ *Id.* ¶¶ 133, 158, 166, 171, 181.

⁴¹⁶ *The Prosecutor v. Charles Blé Goudé*, Corrigendum to the “Decision Referring the Case of *The Prosecutor v. Charles Blé Goudé* to Trial Chamber I,” ICC-02/11-

Before the Trial Chamber had the opportunity to establish any decisions regarding disclosure or a trial start date, the Prosecution requested to join the *Gbagbo* and *Blé Goudé* cases.⁴¹⁷ As explained above, the joinder was granted on 11 March 2015.⁴¹⁸ The joint trial is currently scheduled to commence 10 November 2015.⁴¹⁹

02/11-193, 20 December 2014 (registered on 22 December 2014), ICC-02/11-02/11-193-Corr (The Presidency, 20 December 2014).

⁴¹⁷ The Prosecutor v. Charles Blé Goudé, Prosecution's Request to Join the Cases of the Prosecutor v. Laurent GBAGBO and The Prosecutor v. Charles BLE GOUDÉ, supra n. 382.

⁴¹⁸ *Gbagbo & Blé Goudé*, Decision on Prosecution Requests to Join the Cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and Related Matters, supra n. 343, ¶ 74.

⁴¹⁹ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Order Setting the Commencement Date for Trial, ICC-02/11-01/15-58 (Trial Chamber I, 7 May 2015).

IV. ANALYSIS AND RECOMMENDATIONS

A. The Failure of the Confirmation Process to Achieve Its Intended Goals

As is evident from the forgoing summary, despite repeated insistence on the part of the Pre-Trial Chambers that the confirmation hearing is not intended as a “mini-trial,”⁴²⁰ the process has consistently proven to be costly in terms of time and resources on the part of the parties and the Court. Importantly, this is not just a product of the ICC being a new institution and/or the confirmation process being an innovation unique to this Court. Indeed, one of the most recent cases to be brought before the Court, the *Gbagbo* case, proved to be one of the most litigious and lengthy confirmation of charges processes to date at the Court.⁴²¹ Such a lengthy process is not only at odds with the summary proceedings envisioned by the drafters of the Rome Statute,⁴²² but has also failed to fulfill the intended goals of the confirmation proceedings identified by the drafters of the Rome Statute and the ICC judges themselves, as discussed immediately below.

⁴²⁰ See, e.g., *Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 35, ¶ 64; *Abu Garda*, Decision on the Confirmation of Charges, *supra* n. 33, ¶ 39.

⁴²¹ As detailed above, Mr. Gbagbo made his initial appearance on 5 December 2011, yet the decision confirming the charges was not rendered until 12 June 2014, and leave for appeal was not rejected until 11 September 2014. See *supra* n. 344 *et seq.* and accompanying text. Altogether, two years, nine months, and seven days passed and 680 submissions, decisions, or orders were filed between Mr. Gbagbo’s initial appearance and the decision rejecting his leave to appeal. See International Criminal Court Website, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé: Court Records from Laurent Gbagbo Case: Filings of the Participants*, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/ICC-02_11-01_15/ICC-02_11-01_11/Pages/default.aspx.

⁴²² See *supra* n. 21 *et seq.* and accompanying text. See also William Schabas, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 735* (Oxford University Press, 2010) (“[T]hose who conceived of the confirmation hearing viewed it as a much more summary and brief process than what it has become in the hands of the judges of the Court.”).

1. Ensuring Prosecutorial Fairness and Effectiveness in Investigations

As discussed in Section II.B, one of the reasons that the drafters of the Rome Statute decided to include a confirmation process was to serve as a check against the Prosecutor's authority to determine the charges in a case. Specifically, it appears that the drafters envisioned the confirmation process as a means of ensuring prosecutorial fairness and effectiveness in investigations.⁴²³ With regard to ensuring prosecutorial fairness, it should first be stressed that, while the drafters of the Rome Statute were concerned about the power of a "rogue" international prosecutor with the authority to bring politically-motivated prosecutions,⁴²⁴ there is no evidence to suggest this would actually occur. Indeed, as William Schabas has observed:

The concerns about such vexatious or erroneous prosecution hardly seem legitimate, given the international context.... [T]he practice of international tribunals has shown that prosecution on wrongful or wholly unfounded charges is not a significant problem, notwithstanding the fact that accused persons are sometimes acquitted. This constitutes a rather poor and unconvincing justification for what has proven to be a rather significant, costly, and time-consuming process, resulting in decisions numbering in the hundreds of pages.⁴²⁵

In any event, if such a politically-motivated, frivolous case was brought by the Prosecution, presumably the Pre-Trial Chamber would

⁴²³ See *supra* n. 32 and accompanying text.

⁴²⁴ See, e.g., Ambos & Miller, *supra* n. 31, at 349 ("As is well known, the establishment of a strong Pre-Trial Chamber within the ICC was the answer of the like-minded States to demands of less ICC friendly States for a (political) control of the Prosecutor by the UN Security Council."); Christoph Safferling, *INTERNATIONAL CRIMINAL PROCEDURE* 342 (Oxford University Press, 2012) (explaining that one reason behind the creation of the Pre-Trial Chamber was "political," namely: "to avoid the prosecutor from becoming a kind of superpower"); Scheffer, *supra* n. 24, at 157 (describing the intent of the Rome Statute's negotiators "to create a [Pre-Trial Chamber] that would properly limit an overly ambitious Prosecutor from overreaching with his powers and check any zealotry in his investigations").

⁴²⁵ Schabas, *supra* n. 422, at 734-35.

refuse to issue an arrest warrant or summons to appear and the case would never proceed to the confirmation stage, let alone trial.

To the extent the argument about prosecutorial fairness relates to protecting the suspect from being required to undergo a lengthy trial on unmeritorious charges, one could argue that the confirmation process has in fact served this function, as the Pre-Trial Chambers have refused to confirm charges against four suspects in cases. However, upon closer examination, it seems clear that the cases that have not been confirmed have been so weak that the charges could have been easily disposed of pursuant to a process far less rigorous than that which has come to characterize the confirmation process. This is certainly true for the *Abu Garda* case, about which Judge Tarfusser wrote that the “lacunae and shortcomings exposed by the mere factual assessment of the evidence” presented by the Prosecution were “so basic and fundamental” that the Chamber should have completely refrained from analyzing the “legal issues pertaining to the merits of the case.”⁴²⁶ Similarly, in the *Mbarushimana* case, the Pre-Trial Chamber determined that, in a number of instances, the Prosecution either provided *no evidence* to support particular elements of the charged crime,⁴²⁷ or relied on a single witness who was unable to provide relevant details⁴²⁸ or anonymous hearsay statements not

⁴²⁶ *Abu Garda*, Decision on the Confirmation of Charges, *supra* n. 33, Separate Opinion of Judge Cuno Tarfusser, ¶ 3.

⁴²⁷ See, e.g., *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 238, ¶ 134 (“The Prosecution does not specifically allege that the acts relied on to support the charge of mutilation were carried out [REDACTED] was still alive and no evidence is provided to support the view that he was mutilated before, as opposed to after, he was killed. Accordingly, the Chamber is not satisfied that there is sufficient evidence establishing substantial grounds to believe that the crime of mutilation under either article 8(2)(c)(1)-2 or 8(2)(e)(xi)-1 of the Statute was committed by FDLR soldiers in Busurungi and surrounding villages in March 2009.”); *id.* ¶ 135 (“No evidence was provided to the Chamber in relation to an attack against the civilian population in Busurungi on or about 28 April 2009.”); *id.* ¶¶ 204-05 (noting that, although the Prosecution alleged that the war crime of torture was committed in the village of Malembe in August 2009, “no evidence of torture being committed during the attack on Malembe was provided to the Chamber”).

⁴²⁸ For instance, although the Prosecution charged *Mbarushimana* with the war crime of attacking civilians in the village of Busurungi in late January 2009, the only evidence provided to support that the attack took place was the statement of one witness, who “mentioned an attack on Busurungi around January or February 2009, but... did not provide any further details in relation to this attack.” *Id.* ¶¶ 130-31. See also *id.* ¶¶ 204-06 (noting that the only evidence put forward by the Prosecution in support of the charge that the war crime of rape was committed in the village of

substantiated by other evidence.⁴²⁹ Likewise, the Chamber presiding over the *Ruto, et al.* case declined to confirm charges against Mr. Kosgey because the Prosecutor only put forward one anonymous witness to testify to Mr. Kosgey's involvement within the alleged organization responsible for committing the charged crimes.⁴³⁰ Finally, in discussing the charges against Mr. Ali in the *Kenyatta, et al.* case, the Chamber determined that, while reliable, the Prosecutor's *own evidence* contradicted its theory that the conduct of the Kenyan police for which Mr. Ali was allegedly responsible was undertaken pursuant to a policy to commit crimes against humanity, as required by the Rome Statute.⁴³¹ It is also worth highlighting in this context that neither of the *ad hoc* criminal tribunals have a procedural stage akin to the confirmation stage at the ICC,⁴³² and yet both tribunals have had low rates of acquittal,⁴³³ and there are no cases that are generally

Malembe in August 2009 was a statement from a single witness who "mention[ed] that sexual violence *might* have been perpetrated in Malembe, without giving any further concrete information") (emphasis in original).

⁴²⁹ See *id.* ¶ 117 (rejecting the Prosecution's allegations that the suspect bore responsibility for war crimes committed in the villages of Malembe and Busheke in late January 2009 because, "[i]n both cases the Prosecution relied only on a single UN or Human Rights Watch Report" to support the allegations, without providing "any other evidence in order for the Chamber to ascertain the truthfulness and/or authenticity of those allegations," and in both cases the reports were themselves based on information from anonymous sources).

⁴³⁰ *Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 33, ¶ 293 (noting further that anonymous witnesses are treated with a lower probative value and require more corroboration to be credible).

⁴³¹ *Id.* ¶ 266.

⁴³² At both the ICTY and the International Criminal Tribunal for Rwanda (ICTR), a judge of the Trial Chamber reviews the initial indictment prepared by the Prosecutor and, if satisfied that a *prima facie* case is presented, issues an arrest warrant. See Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 19 (September 2009); Statute of the International Criminal Tribunal for Rwanda, Art. 18 (January 2010); International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, IT/32/Rev. 49, R. 47(A) (22 May 2013); International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, R. 47(A) (13 May 2015). A *prima facie* case is "understood to be a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge." *Prosecutor v. Kordić*, Decision on Review of the Indictment, IT-95-14, ¶ 11 (ICTY Single Judge, 10 November 1995). The case then proceeds to trial before the Trial Chamber once the suspect is in custody. ICTY Statute, Art. 20; ICTR Statute, Art. 19.

⁴³³ According to a 2013 study, both the ICTY and the ICTR had acquittal rates of 13 to 14 percent. See Alette Smeulers, *et al.*, *Sixty-Five Years of International Criminal*

considered to have gone through trial based on “wrongful and wholly unfounded” charges.⁴³⁴ Thus, it is difficult to argue that the ICC, which deals with the same types of cases that have been brought before the *ad hoc* tribunals, would see a dramatic increase in frivolous cases absent the confirmation process as it has taken place at the ICC to date. In fact, it is important to remember that, at the time the Rome Statute was drafted, the *ad hoc* criminal tribunals were still relatively new institutions, meaning that the adoption of a confirmation process at the ICC should in no way be seen as an attempt to remedy a system that had proven unworkable at the Yugoslavia or Rwanda tribunals.

In any event, the utility of the confirmation process as a filtering mechanism is questionable in light of the fact that the Prosecution is permitted to continue investigating a case post-confirmation⁴³⁵ and “is not necessarily required to rely on entirely the same evidence at trial as it did at the confirmation stage.”⁴³⁶ Indeed, despite the Appeals Chamber’s observation that the Prosecution’s investigations should be “largely completed” by confirmation,⁴³⁷ the “clear variation in numerous cases between the evidence disclosed pre-confirmation and that disclosed for the purpose of trial” demonstrates that this has not

Justice: The Facts and Figures, in THE REALITIES OF INTERNATIONAL CRIMINAL JUSTICE 20 (Dawn Rothe, *et al.*, eds. 2013).

⁴³⁴ As noted above, the Pre-Trial Chambers have stated that the purpose of confirmation is to protect suspects from “wrongful and wholly unfounded charges.” See, e.g., *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 33, ¶ 37; *Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 35, ¶ 63.

⁴³⁵ *Mbarushimana*, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the Confirmation of Charges,” *supra* n. 262, ¶ 44.

⁴³⁶ *The Prosecutor v. Kenyatta*, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ICC-01/09-02/11, ¶ 105 (ICC Trial Chamber, 26 April 2011). See also *Ruto & Sang*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer’ Motions), *supra* n. 290, ¶ 14 (“The lower evidentiary standard, limited evidentiary scope and distinct evidentiary rules applicable at the confirmation of charges stage do not preclude a subsequent consideration of the evidence actually presented at trial by the Prosecution in light of the requirements for conviction of an accused. Furthermore, the nature and content of the evidence may change between the confirmation hearing and completion of the Prosecution’s presentation of evidence at trial. In addition, the Prosecution need not introduce the same evidence at trial as it did for confirmation.”).

⁴³⁷ *Mbarushimana*, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the Confirmation of Charges,” *supra* n. 262, ¶ 44.

been the case in practice.⁴³⁸ For instance, in *Lubanga*, the Pre-Trial Chamber confirmed the charges relying “for the most part” on witness statements from child soldiers called by the Prosecution,⁴³⁹ whose evidence was subsequently rejected entirely by the Trial Chamber.⁴⁴⁰ More recently, the Prosecution dramatically altered its witness list in each of the Kenya cases between confirmation and trial. Specifically, in *Kenyatta*, it dropped seven of the twelve witnesses it relied upon for confirmation and added twenty-six new witnesses in the lead up to trial.⁴⁴¹ In *Ruto & Sang*, the Prosecution added new witnesses just six weeks prior to the start of trial.⁴⁴² While circumstances in Kenya may have forced these changes on the Prosecution, the fact remains that the case confirmed was not the same as the case that would be presented at trial. This in turn raises serious questions about the filtering benefits gained from a process as time- and resource-intensive as the confirmation process has proved to be.

Finally, the practice at the Court to date in no way supports the notion that the confirmation process is encouraging “effective” investigations. Indeed, one may question whether the process may actually serve as a *disincentive* to the Prosecution in terms of having a case “trial ready”

⁴³⁸ Guénaél Mettraux, et al., Expert Initiative On Promoting Effectiveness At The International Criminal Court, at 124 (December 2014).

⁴³⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Mr Thomas Lubanga’s Appellate Brief Against the 14 March 2012 Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2948-Red-tENG, ¶ 11 (Defense, 3 December 2012). Notably, the Appeals Chamber does not take issue with the Defense’s characterization of the evidence relied upon by the Pre-Trial Chamber; rather, it holds that this evidence was subsequently supplemented by additional evidence that the Trial Chamber used in its ultimate finding of guilt. See *Lubanga*, Public redacted Judgment on the Appeal of Mr Thomas Lubanga Dyilo against His Conviction, *supra* n. 98, ¶ 132 (“Accordingly, in the present case, not only the Document Containing the Charges and the Decision on the Confirmation of Charges, but also the Amended Document Containing the Charges and the Summary of Evidence provided Mr Lubanga with information about this part of the charges. It follows that the question of whether Mr Lubanga was informed in sufficient detail of this part of the charges must be assessed not only by reference to the former, but also to the latter two documents.”). Indeed, a review of the *Lubanga* confirmation decision reveals that, although the Pre-Trial Chamber does cite to evidence other than the witness statements and testimony of child soldiers, that evidence was heavily relied upon by the Chamber in deciding to confirm the charges. See *generally Lubanga*, Decision on the Confirmation of Charges, *supra* n. 33.

⁴⁴⁰ See *supra* n. 96 and accompanying text.

⁴⁴¹ Mettraux, *et al.*, *supra* n. 438, at 125.

⁴⁴² *Id.*

prior to seeking a summons to appear or warrant for arrest, as it provides the Prosecution an interim stage during which to audition a case with a lower standard than that applied at trial. This possibility was starkly expressed by the *Mbarushimana* Pre-Trial Chamber, which criticized the Prosecution for including vague charges against the suspect without evidence to back up those charges, suggesting that the Prosecution was hoping to continue investigating after the charges were confirmed.⁴⁴³ Specifically, the Chamber expressed “concern” at what it characterized as an “attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why [certain charges were not pled with greater specificity] and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure [governing amendments to the charges].”⁴⁴⁴ In fact, given the deep deficiencies in the Prosecution’s cases against Mr. Mbarushimana and other suspects whose cases have not been confirmed, it is questionable whether these cases ever would have been brought if the Prosecution had anticipated the need to be trial ready at the time it first initiated those cases before the Court.

2. *Rights of the Suspect*

A second goal of the confirmation process is to protect the rights of the charged person, as the process provides suspects the opportunity to contest wrongful charges before being committed to a lengthy trial.⁴⁴⁵ In practice, however, confirmation proceedings have seemed to

⁴⁴³ *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 238, ¶¶ 81-82, 110.

⁴⁴⁴ *Id.* ¶ 82. *See also id.* ¶ 110 (“[T]he Chamber wishes to highlight that the charges and the statements of facts in the DCC have been articulated in such vague terms that the Chamber had serious difficulties in determining, or could not determine at all, the factual ambit of a number of the charges.”). Article 61(9) of the Rome Statute provides as follows: “After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.” Rome Statute, *supra* n. 2, Art. 61(9).

⁴⁴⁵ *See supra* n. 33 *et seq.* and accompanying text.

operate *contrary* to the rights of the suspect by interfering with the right to a speedy trial.⁴⁴⁶ While the length of the proceedings may seem justified if, at the conclusion of the process, the charges were settled and the case could move quickly to trial, neither of these benefits actually accrue to an accused. Rather, the Court's repeated use of Regulation 55 to re-characterize the facts underlying the charges and change the mode of liability,⁴⁴⁷ coupled with the fact that the Prosecution is not required to rely on the same evidence at trial that was used to confirm charges,⁴⁴⁸ means that the Court is spending on average more than fourteen months⁴⁴⁹ to confirm charges that may be dramatically altered over the course of trial. Thus, for instance, Germain Katanga was ultimately convicted based on a re-characterization that, according to one judge, "*fundamentally change[d]* the narrative of the charges in order to reach a conviction on the basis of a crime or form of criminal responsibility *that was not originally charged by the prosecution.*"⁴⁵⁰ More recently, in the *Gbagbo* case, the Trial Chamber invoked Regulation 55 to alert the parties that it may re-characterize the charges to include a mode of liability that the Pre-Trial Chamber *expressly refused* to confirm.⁴⁵¹ Indeed, the Pre-Trial Chamber stated in its confirmation decision that charging Mr. Gbagbo under Article 28 of the Rome Statute "would require the Chamber to *depart significantly* from its understanding of how events unfolded in Cote d'Ivoire during the post-electoral crisis and [his] involvement therein."⁴⁵² Nevertheless, the Gbagbo Defense team must now prepare to defend against such charge at trial.⁴⁵³ Even

⁴⁴⁶ See Mettraux, *et al.*, *supra* n. 438, at 94 (explaining that "existence of a confirmation process has the overall effect of prolonging the proceedings"); Safferling, *supra* n. 424, at 343 ("[E]ven if the purpose of confirmation is to protect the suspect from unfounded allegations, the procedure is far too lengthy, especially where the person concerned is in pre-trial detention.").

⁴⁴⁷ See *supra* n. 81 *et seq.* and accompanying text.

⁴⁴⁸ See *supra* n. 436 *et seq.* and accompanying text.

⁴⁴⁹ See *supra* Figure One.

⁴⁵⁰ *Katanga & Ngudjolo*, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, *supra* n. 145, Dissenting Opinion of Judge Christine Van den Wyngaert, ¶ 19 (emphasis added).

⁴⁵¹ See generally *Gbagbo and Blé Goudé*, Decision Giving Notice Pursuant to Regulation 55(2) of the Regulations of the Court, *supra* n. 387.

⁴⁵² *Gbagbo*, Decision on the Confirmation of Charges Against Laurent Gbagbo, *supra* n. 343, ¶ 265 (emphasis added).

⁴⁵³ *Gbagbo and Blé Goudé*, Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court, *supra* n. 387.

the relatively minor example of the *Lubanga* Trial Chamber instructing the accused to prepare to defend against charges of crimes committed in both international and non-international conflict, despite the fact that the Prosecution had only brought charges in non-international armed conflict,⁴⁵⁴ suggests that the accused is gaining little benefit from the extremely lengthy confirmation process.

Nor has the confirmation process guaranteed the suspect rapid access to the details of the Prosecution's case. On this point, Karim Khan, a prominent defense attorney who has represented clients before both the ICTY, which has no confirmation process, and the ICC, has explained as follows:

At the first modern international criminal tribunal, the ICTY, the prosecution provides the disclosure it relied upon to obtain the indictment against the accused to the defense at or shortly after the initial appearance of the accused. At the ICC this does not occur. Instead, a "final" deadline for prosecution disclosure at the confirmation stage is set at thirty days prior to the start of the confirmation hearing, with the general disclosure process and other timelines at the confirmation and trial stages governed by decisions of the pre-trial and trial chambers.⁴⁵⁵

Khan clearly feels this approach is detrimental to the suspect. For instance, he cites to the *Abu Garda* case, in which the Defense "did not receive a single item of disclosure from the [P]rosecution until more than three months" after the initial appearance of the suspect.⁴⁵⁶

⁴⁵⁴ See *supra* n. 76 *et seq.* and accompanying text.

⁴⁵⁵ Karim A. A. Khan & Anand A. Shah, *Defensive Practices: Representing Clients Before the International Criminal Court*, 76 *Law and Contemporary Problems* 191, 201 (2014). See also V.C. Lindsay, *A Review of International Criminal Court Proceedings under Part V of the Rome Statute (Investigation and Prosecution) and Proposals for Amendments*, *Revue Québécoise de Droit International* 193-95 (2010) ("At the [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... In contrast, at the ICC there is no guarantee that evidence will be disclosed until months after the initial appearance.").

⁴⁵⁶ Khan & Shah, *supra* n. 455, at 201.

Furthermore, the “final substantive” disclosure in the *Abu Garda* case, which included “core evidence in the case,” such as the “revised versions of summaries of interview transcripts of six prosecution witnesses,” did not take place until “a few days prior to the thirty-day deadline.”⁴⁵⁷ Significantly, Khan describes this case as “emblematic” of the general practice at the ICC in terms of pre-confirmation disclosure.⁴⁵⁸ Perhaps even more dramatically, in the *Kenyatta, et al.* case, the Prosecution disclosed its Document Containing the Charges, a more than 6,600 page “in-depth analysis chart,” and “an additional 1,300 pages of incriminatory disclosure, including more than 1,200 pages of transcripts of witness interviews” “exactly at the thirty-day deadline,” leaving the Defense teams very little time to review the vast amount of information prior to confirmation.⁴⁵⁹ Lastly, Khan notes that pre-confirmation disclosure is often of little value to the Defense when it is eventually turned over, as Article 61(5) of the Rome Statute permits the Prosecutor to rely on summary evidence for confirmation purposes, meaning “there is hardly any meat for the defense to sink its investigative teeth into.”⁴⁶⁰ In fact, even when documents are disclosed as opposed to summaries, heavy redactions can render the documents incomprehensible.⁴⁶¹

Finally, while the confirmation process may be viewed as Defense-friendly because it permits a suspect to challenge the charges before being committed to what is likely to be a multi-year trial, choosing to contest the case at this stage also means that the Prosecution is allowed a preview of the Defense’s strategy and evidence. Such a preview is particularly significant in light of the fact that the Prosecution is permitted to continue its investigation and gather new evidence following confirmation,⁴⁶² meaning it can effectively “adapt its case

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.* at 202-03.

⁴⁶⁰ *Id.* at 205.

⁴⁶¹ *See id.* at 206 (explaining that the fact that the ICC Appeals Chamber has upheld the use of redactions not only for witnesses and their family members, but also “others at risk on account of the activities of the Court,” has “resulted in a sweeping and resource-intensive redaction regime that is highly prejudicial to the ability of the defense to analyze prosecution disclosure and conduct investigations.”).

⁴⁶² *See, e.g., The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence,” ICC-01/04-

strategy and continue its investigations within the framework of the confirmed case with a view to countering the defense's expected case at trial."⁴⁶³

3. *Judicial Economy*

Several of the problems discussed above also demonstrate that the confirmation of charges fails to meet the goal of confirmation identified by several ICC judges themselves, namely: judicial economy.⁴⁶⁴ First, the significant delays in the confirmation proceedings brought about by litigation over disclosure, victims' participation, and the extent of the charges waste time and resources during the confirmation process itself. Such inefficiency is exacerbated by the fact that these issues are not considered "settled" for the purposes of trial once a case is confirmed.⁴⁶⁵ Indeed, as one author who has written extensively on the ICC has observed, the Trial Chambers have "understandably" found it necessary "to take charge of the preparations of the case for the trial that the Chamber is to conduct," meaning that "extensive and time-consuming preparations have taken place twice, albeit for different procedural purposes."⁴⁶⁶

Nor does the confirmation process necessarily narrow the issues that need to be litigated at trial. As explained by a group of experts that recently convened to study ways to promote efficiency at the Court:

Pre-trial decisions should and could be more precise
and more narrowly focused on making clear which

01/06-568, ¶ 2 (ICC Appeals Chamber, 13 October 2006) ("The Prosecutor's investigation may be continued beyond the confirmation hearing. Such investigations may relate to alleged new crimes as well as to alleged crimes that are encompassed by the confirmation hearing.").

⁴⁶³ Khan & Shah, *supra* n. 455, at 220.

⁴⁶⁴ See *supra* n. 36 *et seq.* and accompanying text.

⁴⁶⁵ See, e.g., International Criminal Court, Study Group on Governance, *Lessons Learnt: First Report of the Court to the Assembly of States Parties*, ICC-ASP/11/31/Add.1, Annex ¶ B.2 (23 October 2012) (noting that "Pre-Trial and Trial Chambers have applied different rules with regard to the relevance and admissibility of evidence" and concluding that "[t]his practice is time consuming"); Mettraux, *et al.*, *supra* n. 438, ¶ 38 (noting the "duplication of resources generated by the repetition of [redactions] at pre-trial and trial).

⁴⁶⁶ Håkan Friman, Trial Procedures – With a Particular Focus on the Relationship between the Proceedings of the Pre-Trial and Trial Chambers, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 915 (Carsten Stahn, ed. 2015).

factual allegations have been confirmed and, as the case may be, to what precise extent. For instance, Article 61(7) decisions sometimes remain vague as regards the time of the alleged crimes, the place where they are alleged to have occurred, the identity of the perpetrators, the exact nature of the alleged contribution of the [suspect] and the identity of the alleged victims... Lack of a clear indication of what factual allegations have been confirmed at the confirmation stage means that the confirmation process contributes little to providing notice of charges to the accused and to making trials fairer and faster, leaner and more focused on core factual issues relevant to the case.⁴⁶⁷

Finally, the fact that the Prosecution need not rely on the same factual allegations or evidence at trial as at the confirmation hearing⁴⁶⁸ detracts from the argument that the confirmation process enhances judicial efficiency. There is simply no point to spending roughly one year to confirm charges based on one set of factual allegations as established by particular evidence if the Trial Chamber will ultimately be deciding on the basis of different factual allegations and different evidence.

B. Alternatives

1. Changes Currently Under Consideration Are Either Insufficient to Align the Confirmation Process with Its Intended Goals or Inappropriately Expand the Process

Given the disconnect between the drafters' and the Court's intentions regarding the confirmation process and the way that process has played out in practice, it is clear that changes to the system are in order. Notably, in 2014, two separate expert working groups issued recommendations aimed at improving the confirmation process. The first came from the Working Group on Lessons Learnt, which was

⁴⁶⁷ Mettraux, *et al.*, *supra* n. 438, at 83-84. While the Pre-Trial Chambers have attempted to respond to this criticism in recent cases, as discussed below, there is no evidence that the reformatted decisions have settled the charges for purposes of trial or expedited post-confirmation, pre-trial preparations. *See infra* n. 475 *et seq.* and accompanying text.

⁴⁶⁸ *See supra* n. 436 *et seq.* and accompanying text.

created by the Assembly of States Parties' Study Group on Governance and is made up of ICC judges.⁴⁶⁹ The second came from an independent group of experts in the field of international criminal law who conducted a study on means to promote effectiveness at the ICC.⁴⁷⁰ These groups, respectively, identified the confirmation process as a subject "that need[s] discussion with the view to expediting proceedings and enhancing their quality"⁴⁷¹ and an "area of concern."⁴⁷²

However, the changes proposed by each of these initiatives are insufficient to render the confirmation process consistent with the goals of the drafters and the Court itself. For instance, the Working Group on Lessons Learnt recommended the adoption of "a streamlined, consistent disclosure system applicable at all stages of a case," the use of hyperlinks to evidence in the Document Containing the Charges, and encouraging parties to stipulate to agreed facts early in the proceedings.⁴⁷³ For its part, the independent panel of experts' report recommended that the Pre-Trial Chambers make "clear what material facts have been confirmed and what they consist of exactly," confirm charges or modes of liability in the alternative where evidence supports multiple possible legal characterizations, enforce disclosure deadlines more strictly, and limit the number of live witnesses presented at the confirmation hearing.⁴⁷⁴ While these recommendations may improve the problems with the confirmation phase at the margins, ultimately, they are not going to bring the process in line with the goals identified above. In fact, the *Ntaganda* and *Gbagbo* Pre-Trial Chambers applied several of these changes,⁴⁷⁵

⁴⁶⁹ See ICC Study Group on Governance, *Lessons Learnt: First Report of the Court to the Assembly of States Parties*, *supra* n. 465, ¶ 13 ("A Working Group on Lessons Learnt ('Working Group') will be established in October 2012 which will be open to all interested judges in order to commence work on the issues identified in the current report and to determine whether amendments to the Rules of Procedure and Evidence are required.").

⁴⁷⁰ See generally Mettraux, *et al.*, *supra* n. 438, at 83-84.

⁴⁷¹ ICC Study Group on Governance, *Lessons Learnt: First Report of the Court to the Assembly of States Parties*, *supra* n. 465, ¶ 8, Annex.

⁴⁷² Mettraux, *et al.*, *supra* n. 438, at 2-3.

⁴⁷³ International Criminal Court, Working Group on Lessons Learnt, *Progress Report on Cluster B: "Pre-Trial and Trial Relationship and Common Issues,"* ¶¶ 7, 14, 18 (8 April 2014).

⁴⁷⁴ Mettraux, *et al.*, *supra* n. 438, ¶¶ 34, 35, 38, 56.

⁴⁷⁵ See, e.g., International Criminal Court, Report of the Bureau on Study Group on Governance, Annex II: Report of the Working Group on Lessons Learnt to the Study

but the confirmation processes were still lengthy and there is no indication that the trial preparations in those cases are progressing more quickly than seen in other cases.⁴⁷⁶

The fact is that a fundamental restructuring of the confirmation process is in order. Indeed, in its most recent report to the Assembly of States Parties, the Working Group on Lessons Learnt acknowledged that “it is increasingly clear that the shortening and streamlining of pre-trial and trial proceedings cannot be achieved by individual amendments and a piecemeal approach to the legal framework.”⁴⁷⁷ One way to bring about such a dramatic restructuring – albeit not the one we recommend – is to significantly *expand* the confirmation process in a manner that would result in a case being much more “trial ready” than is currently the case. Notably, Pre-Trial Chambers appear to be increasingly moving towards this approach. This is evidenced, first, in the trend toward requiring that all exculpatory evidence be disclosed prior to confirmation and that all evidence disclosed between the parties be shared with the Pre-Trial Chamber in order to assist that Chamber in its “truth seeking” function.⁴⁷⁸ Second, the move toward

Group on Governance Cluster I: Expediting the Criminal Process Progress Report on Cluster B: “Pre-Trial and Trial Relationship and Common Issues,” ICC-ASP/13/28, ¶¶ 17-19, 22-23 (28 November 2014) (explaining that: (i) changes were made to the format of the Ntaganda and Gbagbo confirmation decisions in order to better identify the facts and circumstances confirmed; and (ii) in each case, charges were confirmed based on alternative modes of liability). See also *supra* n. 355 and accompanying text (explaining that no live witnesses testified in the Gbagbo confirmation hearing).

⁴⁷⁶ See *supra* n. 327 *et seq.* and accompanying text.

⁴⁷⁷ Report of the Bureau on Study Group on Governance, Annex II: Report of the Working Group on Lessons Learnt to the Study Group on Governance Cluster I: Expediting the Criminal Process Progress Report on Cluster B: “Pre-Trial and Trial Relationship and Common Issues,” *supra* n. 475, ¶ 32.

⁴⁷⁸ See *supra* n. 171 *et seq.* and accompanying text. Significantly, although Chambers have taken different approaches to the amount of evidence that must be shared with the judges for purposes of confirmation, the ICC’s recently published *Pre-Trial Practice Manual*, which is described as “the product of discussions held among the Judges of the Pre-Trial Division... with a view to identifying solutions to challenges faced in the first years of the Court and build on the experience acquired so far,” recommends that “all evidence disclosed between the parties during the pre-trial proceedings, *i.e.* between the person’s initial appearance (or, in particular circumstances, even before) and the issuance of the confirmation decision” be shared with the Pre-Trial Chamber.” ICC, *Pre-Trial Practice Manual*, *supra* n. 134, at 2, 10. While the manual goes on to say that a Chamber may consider “only the items of evidence that are included in the parties’ lists of evidence for the purpose of the confirmation hearing,” it also states that “[o]ther items of evidence that were

an ever more expansive confirmation process is evidenced by the Pre-Trial Chamber's decision to adjourn the proceedings in the *Gbagbo* case to demand more evidence from the Prosecution.⁴⁷⁹ As discussed above, the Chamber in that decision insisted that the Prosecution present its "strongest possible evidence based on a largely completed investigation,"⁴⁸⁰ as opposed to evaluating whether the Prosecution had presented sufficient evidence to establish substantial grounds to believe the charged crimes had been committed. The Chamber's rationale – that the Defense "should not be presented with a wholly different case at trial"⁴⁸¹ – is understandable and indeed addresses one of the problems identified above with respect to the disconnect between the confirmation process in practice and the goals of the drafters.⁴⁸² However, the Chamber's approach is completely at odds with the low standard required at the confirmation stage⁴⁸³ and the fact that the Rome Statute expressly authorizes the Prosecution to rely on "summary" evidence at confirmation.⁴⁸⁴ Furthermore, even if a

communicated to the Pre-Trial Chamber but have not been included in the lists of evidence could... be relied upon by the Pre-Trial Chamber for the confirmation decision provided that the parties are given the opportunity to make any relevant submission with respect to such other items of evidence," suggesting that the Pre-Trial Chambers may *sua sponte* ask the parties to litigate over evidence that neither sought to introduce for purposes of the confirmation proceedings. *Id.* at 10.

⁴⁷⁹ See *supra* n. 356 *et seq.* and accompanying text.

⁴⁸⁰ *Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, *supra* n. 37, ¶ 25.

⁴⁸¹ *Id.*

⁴⁸² The Chamber further justified its decision by citing to the suspect's right to a speedy trial, but failed to explain how an adjournment in the confirmation process that ultimately added one year to the length of the proceedings was itself consistent with this right. See *Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, *supra* n. 37, ¶ 25.

⁴⁸³ See *supra* n. 69 and accompanying text (citing the *Lubanga* Pre-Trial Chamber for the proposition that the purpose of the confirmation process is simply to protect the suspect from "wrongful and wholly unfounded charges"); *supra* n. 136 and accompanying text (citing the *Katanga & Ngudjolo* Pre-Trial Chamber for the proposition that the purpose of the confirmation process is simply to protect the suspect from "wrongful and wholly unfounded charges").

⁴⁸⁴ See Rome Statute, *supra* n. 2, Art. 61(5). See also Triestino Mariniello & Niccolò Pons, *The Confirmation of Charges at the International Criminal Court: A Tale of Two Models*, in *THE INTERNATIONAL CRIMINAL COURT IN SEARCH OF ITS PURPOSE AND IDENTITY* 218 (2015) (observing that the requirement of the *Gbagbo* Pre-Trial Chamber that the Prosecution put forward its "strongest possible case" "entails the risk of transforming the confirmation of charges into a trial, resulting in potential prejudice to the screening role of the Pre-Trial Chamber and, ultimately, to the expeditiousness of the proceedings").

prolonged confirmation process reduces the amount of preparation required at the trial stage, there will undoubtedly be issues that need to be resolved by the Chamber that will ultimately be deciding on the guilt of the accused, in particular evidentiary issues that will need to be re-litigated in light of the different standards applied at confirmation and trial,⁴⁸⁵ meaning the overall time savings are likely to be insignificant in terms of protecting the suspect's right to a speedy trial and judicial efficiency. A prolonged confirmation stage would be even more problematic for suspects whose cases are ultimately not confirmed, as it will mean such suspects will be deprived of liberty for a substantial period of time before a determination is made that the charges against them were "wholly unfounded."⁴⁸⁶

2. *A Fundamental Scaling Back of the Confirmation Process Is In Order*

The other option for a fundamental change in the confirmation process is to significantly *scale back* the proceedings in a way that realigns the confirmation process with the intent of the drafters and leaves "the trial preparations in the hands of the Chamber that is responsible for the trial."⁴⁸⁷ Specifically, we recommend requiring that the confirmation process be conducted solely on the basis of written submissions and that it be completed within ninety days of a suspect's first appearance before the Court, absent exceptional circumstances.⁴⁸⁸ This could be achieved through a series of amendments to the ICC's

⁴⁸⁵ See *supra* n. 190 and accompanying text (explaining that the ICC Appeals Chamber overturned the Bemba Trial Chamber's decision to *prima facie* admit all evidence that was used at confirmation for purposes of trial in light of the fact that different standards apply at the two stages).

⁴⁸⁶ As noted above, the Pre-Trial Chambers have stated that the purpose of confirmation is to protect suspects from "wrongful and wholly unfounded charges." See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06-803, ¶ 37 (Pre-Trial Chamber I, 29 January 2007); *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, ¶ 63 (Pre-Trial Chamber I, 30 Sept 2008).

⁴⁸⁷ Håkan Friman, Trial Procedures – With a Particular Focus on the Relationship between the Proceedings of the Pre-Trial and Trial Chambers, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 915 (Carsten Stahn, ed. 2015).

⁴⁸⁸ The ninety-day time frame may also need to be extended in the event that the Pre-Trial Chamber grants one or both parties leave to appeal its decision on whether to confirm the charges. However, as discussed in Section III above, such leave is rarely granted. For further discussion on this issue, see *infra* n. 530 *et seq.* and accompanying text.

Rules of Procedure and Evidence⁴⁸⁹ and Regulations of the Court,⁴⁹⁰ coupled with a basic shift in the approach of the Pre-Trial Chambers themselves regarding their role in the confirmation process.

a) Amendments to the Rules of Procedure and Evidence

Scaling back the confirmation process as recommended above will require amendments to three areas of the ICC's Rules: one relating to the oral confirmation hearing, one setting timelines for the submission of documents from the parties, and one relating to disclosure.

First, the Rules would need to be revised to provide that the "hearing" referred to in Article 61 would be limited to a non-evidentiary, non-testimonial hearing. This would mean that, although the parties would be given a brief opportunity to present their arguments for and against confirmation and the Chamber would be able to pose clarifying questions to the parties,⁴⁹¹ the Chamber would primarily base its

⁴⁸⁹ The Rules of Procedure and Evidence may be amended by a proposal offered by any State Party, the judges acting by an absolute majority, or the Prosecutor and must be adopted by a two-thirds majority of the Assembly of States Parties to enter into force. Rome Statute, *supra* n. 2, Art. 51(2). Any amendment must be consistent with the Rome Statute and the Rules of Evidence and Procedure, and the Statute is authoritative on any conflict between the Rules and the Statute. *Id.* Arts. 51(5), 52(1).

⁴⁹⁰ The Regulations of the Court are established and amended by the judges' absolute majority adoption. Rome Statute, *supra* n. 2, Art. 52(1). The Prosecutor and Registrar must be consulted regarding any elaboration or amendment to the Regulations. *Id.* Art. 52(2). Amendments to the Regulations take effect upon adoption unless otherwise decided by the judges. Additionally, amendments shall be circulated to States Parties for comments. If there are no objections from a majority of States Parties within six months, then the amendment shall remain in force. *Id.* Art. 52(3).

⁴⁹¹ While Article 61 does not specify the nature of the "hearing" for purposes of confirmation, it should be noted that the Pre-Trial Chambers themselves have already rejected a "literal" interpretation of the term "hearing" in Article 61, which would have encompassed only "oral sessions taking place before judges." *Bemba*, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, *supra* n. 165, ¶ 32. Specifically, for purposes of interpreting the provision in Article 61(7) permitting the Chamber to "adjourn the hearing," the Bemba Chamber held that "the word 'hearing' must be subject to a contextual and a teleological or effective interpretation" that would allow the Chamber to adjourn "the hearing" subsequent to "the oral sessions." *Id.* ¶¶ 34-37. In reaching this conclusion, the Chamber stressed that a "a teleological interpretation which is mirrored in the principle of effectiveness and based on the object and purpose of a treaty means that the provisions of the treaty are to be interpreted so as to give it its full meaning and

confirmation decision on written submissions. Importantly, limiting the oral confirmation hearing will save time and resources because, as one review has summarized, “[t]he [confirmation] hearings themselves can take days or weeks, involving opening and closing statements, the calling of evidence, and the submission of post-hearing briefs.”⁴⁹² At the same time, as another commentator observed with regard to the confirmation hearings in the *Lubanga* and *Katanga & Ngudjolo* cases, “[t]he hearings... 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.”⁴⁹³ Thus, while proceeding primarily on written submissions

to enable the system to attain its appropriate effects.” *Id.* ¶ 36 (internal citations and punctuation omitted). Furthermore, Rule 165 of the ICC Rules allows a Pre-Trial Chamber to do away with the oral hearing altogether for purposes of confirming cases involving alleged offenses against the administration of justice. Rules of Procedure and Evidence, *supra* n. 29, R. 165(3) (“For purposes of article 61, the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.”). *See also supra* n. 391 *et seq.* and accompanying text (describing the *Bemba, et al.* confirmation proceedings, which took place entirely on the basis of written submissions). Presumably, if Rule 165 is consistent with Article 61 of the Rome Statute, a rule strictly limiting the scope of the Article 61 “hearing” would be similarly permissible.

⁴⁹² Antonio Cassese & Paola Gaeta, *CASSESE’S INTERNATIONAL CRIMINAL LAW* 369 (2013). It should be noted that, although the proceedings in the *Bemba, et al.* confirmation process were lengthy, despite being conducted on the basis of written submissions, the delays in the case were largely due to the fact that the Pre-Trial Chamber appointed an independent counsel to listen to the recordings of all phone calls conducted between Mr. Bemba and his counsel and then to transmit relevant information to the Prosecution for investigation, meaning that the investigation was largely conducted in the midst of the confirmation process. *See supra* n. 401 *et seq.* and accompanying text.

⁴⁹³ Lindsay, *supra* n. 455, at 188 (emphasis added). A similar argument was made by Defense counsel at the close of the *Katanga & Ngudjolo* confirmation hearing. *See The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Confirmation of Charges Hearing Transcript, ICC-01/04-01/07-T-50, at 6-7 (16 July 2008)* (“[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... 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,

is likely to increase efficiency, little will be lost by forgoing public proceedings at this stage.

In lieu of oral hearings, the Chamber's confirmation decision should be based on the Document Containing the Charges, together with supporting evidence, and a written response from the Defense. Limiting the Prosecution to presenting the DCC with supporting evidence is consistent with the notion that the confirmation process is not intended to be a "mini-trial," which is a theme that dates back to the drafting of the Rome Statute and has been consistently espoused, at least in theory, by the Court.⁴⁹⁴ At the same time, an evaluation of the DCC with supporting evidence will permit the Pre-Trial Chamber to evaluate whether there is sufficient evidence to establish substantial grounds to believe each charge. Furthermore, allowing the Defense to file a written submission in response to the DCC will give the suspect the opportunity to exercise his or her rights under Article 61(6) of the Rome Statute to "(a) [o]bject to the charges; (b) [c]hallenge the evidence presented by the Prosecutor; and (c) [p]resent evidence."⁴⁹⁵ In addition, where warranted and possible within the limited time frame recommended below, the Pre-Trial Chamber may permit one or more written briefs from the legal representative(s) of victims.⁴⁹⁶

The second recommended amendment to the Rules of Procedure and Evidence would entail the adoption of strict time limits governing the written submissions upon which the Pre-Trial Chamber will render its confirmation decision. Consistent with the Prosecution's stated strategy of "being as trial-ready as possible from the earliest phases of proceedings,"⁴⁹⁷ we recommend requiring the submission of the

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.").

⁴⁹⁴ See *supra* n. 420 *et seq.* and accompanying text.

⁴⁹⁵ Rome Statute, *supra* n. 2, Art. 61(6).

⁴⁹⁶ Given the shortened time period recommended for the confirmation process, victim representatives may have insufficient time to present their views and concerns at this stage of proceedings. Importantly, however, there is no requirement in the Rome Statute that victims be granted the opportunity to participate at the confirmation phase, and it may be more efficient for the Court to postpone decisions regarding victim participation until after a decision has been made to send a case to trial.

⁴⁹⁷ International Criminal Court Office of the Prosecutor, *Strategic Plan: 2016 – 2018*, at 15 (6 July 2015).

Document Containing the Charges, including hyperlinks to the evidence relied upon in support of the charges for purposes of confirmation,⁴⁹⁸ within thirty days of the suspect's first appearance. Of course, the rule could allow for an extension of this time period in exceptional circumstances, such as where the Prosecution sought an arrest warrant prior to being trial-ready in light of a unique and fleeting "arrest opportunity" or because witnesses were "only willing to cooperate after an arrest."⁴⁹⁹ However, even in such circumstances, the Office of the Prosecutor has stated it will only seek a warrant or summons where "there are sufficient prospects to further collect evidence to be trial-ready within a reasonable timeframe,"⁵⁰⁰ suggesting any exceptional extension of time for purposes of preparing the DCC should be minimal. We would then recommend that the Defense be given thirty days to prepare a written response, which is consistent with the current framework requiring that the Defense receive the DCC thirty days prior to the hearing.⁵⁰¹

Finally, in order to ensure that these documents are submitted within the recommended time frame, the Rules of Procedure and Evidence should be amended to strictly limit pre-confirmation disclosure between the parties, which has been one of the primary causes of delay at the confirmation stage, as discussed throughout Section III of this report. Specifically, we recommend that the Rules provide that the parties disclose *only* that evidence upon which they directly rely in

⁴⁹⁸ The Prosecution adopted this approach in the *Gbagbo* and *Blé Goudé* cases, providing footnotes in the DCC that hyperlinked "to individual items of evidence, to allow the reader to navigate directly to the location of an item of evidence in the electronic record of the case." According to the report of the Working Group on Lessons Learnt, the "judges of Pre-Trial Chamber I considered that the inclusion of hyperlinked footnotes in the DCC... was extremely useful in reaching the determination with respect to the charges." *Report of the Bureau on Study Group on Governance, Appendix II: Report of the Working Group on Lessons Learnt to the Study Group on Governance Cluster I: Expediting the Criminal Process Progress Report on Cluster B: "Pre-Trial and Trial Relationship and Common Issues," supra* n. 475, ¶ 24.

⁴⁹⁹ See ICC OTP *Strategic Plan: 2016 – 2018, supra* n. 497, at 15.

⁵⁰⁰ *Id.* at 15-16.

⁵⁰¹ ICC Rules, *supra* n. 29, R. 121(3) ("The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing."). To the extent victims are granted the opportunity to file written submissions, these should be required prior to the Defense's submission.

their written submissions (*i.e.*, the Document Containing the Charges and response thereto) and postpone the disclosure of exculpatory evidence until after confirmation.⁵⁰² Further, the amended Rules should eliminate the availability of redactions to evidence at the pre-confirmation stage, thereby leaving it to the Prosecution to disclose summaries of evidence containing sensitive information, as expressly contemplated under Article 61(5) of the Rome Statute.⁵⁰³ Such changes would save substantial time and resources, as they will result in a significant decrease in the number of documents disclosed,⁵⁰⁴ circumventing delays related to missed disclosure deadlines, time-consuming translations and redactions of disclosed documents, and the

⁵⁰² The Defense will also be entitled to the evidence relied upon by the Prosecution in support of the warrant of arrest or summons to appear so that it may challenge the validity of the Pre-Trial Chamber's decision under Article 58, as well as any documents necessary for an application for interim release and/or to challenge the jurisdiction or admissibility of the case. *See The Prosecutor v. Callixte Mbarushimana*, Decision on the Defence Request for Disclosure, ICC-01/04-01/10-47, ¶¶ 17-18 (Pre-Trial Chamber I, 27 January 2011) (ordering the disclosure of information necessary for purposes of an admissibility or jurisdictional challenge); *The Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release,' ICC-01/05-01/08-323, ¶ 32 (Appeals Chamber, 16 December 2008) (holding that "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," and specifically that the arrested person will "ideally" have "all such information at the time of his or her initial appearance before the Court").

⁵⁰³ As described above, this was the approach during the *Katanga & Ngudjolo* confirmation proceedings, in which the Single Judge declared that she would reject any requests for redactions from the Prosecution. *See supra* n. 128 and accompanying text. However, no subsequent Pre-Trial Chamber adopted this approach, suggesting that it should be mandated by the ICC's Rules.

⁵⁰⁴ As explained above, recent Chambers have required that the Prosecution disclose *all* potentially exculpatory evidence prior to confirmation, as well as all evidence upon which the Prosecution intends to rely at the hearing. This has resulted in massive amounts of documents disclosed for purposes of what is emphatically *not* a "mini-trial." *See, e.g., Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 33, ¶ 10 (noting that some 14,640 pages of evidence were disclosed by the Prosecution for the purposes of the decision whether to confirm the charges); *Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 33, ¶ 10 (explaining that, over the course of the period leading up to the confirmation hearing, "several thousand pages" of evidence was disclosed and communicated to the Chamber).

need to allow the Defense time to review many thousands of pages of documents in advance of the hearing.

Although it may seem detrimental to the Defense to delay the disclosure of potentially exculpatory evidence until after charges have been confirmed, there is a strong argument to be made that the right to such evidence does not attach until post-confirmation, as the right to exculpatory evidence is found under Article 67, which is entitled “rights of *the accused*.”⁵⁰⁵ By contrast, Article 61 refers strictly to “the person” or “the person charged”⁵⁰⁶ until sub-paragraph (9), which states: “[a]fter the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to *the accused*, amend the charges.”⁵⁰⁷ Indeed, during the *Lubanga* confirmation hearing, Presiding Judge Claude Jorda reprimanded the Registry for referring to Mr. Lubanga as “the accused” in an ICC newsletter and ordered the Registrar to “draft an explanatory note as soon as possible to inform the public that the

⁵⁰⁵ Rome Statute, *supra* n. 2, Art. 67 (emphasis added). Furthermore, the very description of exculpatory evidence used in Article 67(2) seems to presume charges have been confirmed, as it refers to “evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of *the accused*, or to mitigate the guilt of *the accused*...” *Id.* Art. 67(2) (emphasis added).

⁵⁰⁶ See, e.g., *id.* Art. 61(1) (“[W]ithin a reasonable time after *the person’s* surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and *the person charged*, as well as his or her counsel.”) (emphasis added); *id.* Art. 61(3) (“Within a reasonable time before the hearing, *the person* shall: (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring *the person* to trial...” (emphasis added); *id.* Art. 61(4) (“Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. *The person* shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges...” (emphasis added).

⁵⁰⁷ See *id.* Art. 61(9) (emphasis added). See also Jo Stigen, THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY 155 (2008) (explaining that “most national penal systems (at least those of common and civil law) use the two terms ‘suspect’ and ‘accused’, referring to two different *stages* of the proceedings” and noting that “[i]n these systems, the person’s rights become more substantial as his or her status change from a suspect to an accused”) (emphasis in original).

status of Mr Thomas Lubanga Dyilo is... a suspect, not an accused person.”⁵⁰⁸

In any event, Article 67(2) requires only that exculpatory material be shared with the Defense “as soon as practicable,”⁵⁰⁹ and a rapid confirmation process may actually ensure that the Defense start receiving such evidence *earlier* than it has in many of the cases to date. For instance, as already mentioned, the Defense in the *Abu Garda* case did not receive a “single item of disclosure,” incriminating or exonerating, until more than three months after the initial appearance of the suspect.⁵¹⁰ The Defense teams in the *Banda & Jerbo, Kenyatta, et al.*, and *Gbagbo* cases similarly had to wait more than three months to receive potentially exculpatory evidence,⁵¹¹ whereas Msrs. Katanga and Mbarushimana each had to wait more than *four months* after his initial appearance to receive such evidence.⁵¹² Indeed, other than Mr. Lubanga, the only suspects that have received potentially exonerating evidence within less than two months of their initial appearances have been Msrs. Ngudjolo, Arido, and Blé Goudé, each of whom made his appearance well after another suspect who was already or would eventually be joined in the same case.⁵¹³

Figure Four summarizes the amount of time between each suspect’s initial appearance and the first disclosure of exonerating evidence, based on the publicly available court records.

⁵⁰⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Open Session Hearing, ICC-01/04-01/06-T-32-EN, at 36: 15-22 (Transcript, 10 November 2006).

⁵⁰⁹ Rome Statute, *supra* n. 2, Art. 67(2).

⁵¹⁰ *See supra* n. 456 *et seq.* and accompanying text.

⁵¹¹ *See* Annex Four.

⁵¹² *Id.*

⁵¹³ *Id.* It is also worth noting that, even in those cases in which the Pre-Trial Chamber ordered the Prosecution to disclose *all* exculpatory evidence prior to confirmation, such as the *Ruto, et al.* case, the Prosecution continues to make disclosures of such information well after confirmation. *See, e.g., The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches of 9 January 2015 (ICC-01/09-01/11-1774-Conf), ICC-01/09-01/11-1774-Red (Trial Chamber V(a), 16 February 2016).

FIGURE FOUR: Suspect's Wait Time for Potentially Exculpatory Evidence⁵¹⁴

Case	Time Between Suspect's First Appearance and First Disclosure of Potentially Exculpatory Evidence
<i>Lubanga</i>	< 1 month
<i>Katanga & Ngudjolo</i>	> 4 months > 1 month
<i>Bemba</i>	> 2 months
<i>Abu Garda</i>	> 3 months
<i>Banda & Jerbo</i>	> 3 months
<i>Mbarushimana</i>	> 4 months
<i>Ruto, et al.</i>	> 2 months
<i>Kenyatta, et al.</i>	> 3 months
<i>Ntaganda</i>	> 2 months
<i>Gbagbo</i>	> 3 months
<i>Bemba, et al.</i>	Between > 3 months and < 1 month
<i>Blé Goudé</i>	1 month

It is also worth noting that no case to date has failed to pass the confirmation stage due to one or more pieces of *exculpatory* evidence. Rather, each case that has been dismissed at the confirmation stage has

⁵¹⁴ For the dates of each suspect's first appearance before the ICC and the first disclosure of potentially exculpatory evidence to that suspect, together with relevant citations, *see* Annex Four.

failed due to the insufficiency of *inculpatory* evidence presented by the Prosecution.⁵¹⁵

Lastly, even under the recommended scenario, persons charged with crimes by the ICC will remain in a better position than suspects at other international criminal bodies, as they will have the opportunity very early in the process to put forward evidence gathered through their own investigations which may exonerate them. Thus, a suspect subjected to truly “unfounded”⁵¹⁶ charges – such as one with an unimpeachable alibi or one who has been the victim of mistaken identity⁵¹⁷ – has a built-in procedural opportunity to establish his or her innocence at the outset. Furthermore, as recently established by the decision of the *Ruto & Sang* Trial Chamber, an individual who is committed to trial will also have the opportunity to contest the Prosecution’s case during the trial pursuant to a “no case to answer” motion, which may be filed following the close of the Prosecution’s evidence.⁵¹⁸

b) Amendments to the Regulations of the Court

As discussed above, the Regulations of the Court currently require that the Pre-Trial Chamber issue its decision whether to confirm charges against a suspect within sixty days “from the date the confirmation hearing ends.”⁵¹⁹ We recommend that this regulation be amended to require a decision within thirty days of the Defense’s written submission responding to the Document Containing the Charges.

⁵¹⁵ See *supra* Sections III.E, III.G, III.H, III.I.

⁵¹⁶ See *supra* n. 486 *et seq.* and accompanying text.

⁵¹⁷ This in fact happened in one case before the ICTY. Specifically, in the *Limaj, et al.* case, an arrested individual named Agim Murtezi claimed at his initial appearance that he was not the individual named in the indictment. See International Criminal Tribunal for the Former Yugoslavia Press Release, *Statement on behalf of Agim Murtezi*, P.I.S./733e (25 February 2003), <http://www.icty.org/sid/8295>. In that case, the Prosecution moved quickly to withdraw the indictment against Mr. Murtezi and the individual was released. International Criminal Tribunal for the Former Yugoslavia Press Release, *The Prosecutor v. Limaj et al.: Agim Murtezi Released Following the Withdrawal of the Indictment Against Him*, CC/ P.I.S./ 736 (28 February 2003), <http://www.icty.org/sid/8288>. In the event that a similar situation occurred at the ICC and the Prosecution was for some reason not willing to act on its own to secure the release of the wrongly accused individual, that person could present evidence establishing the wrongful arrest during the confirmation process.

⁵¹⁸ See *supra* n. 286 *et seq.* and accompanying text.

⁵¹⁹ ICC Regulations of the Court, *supra* n. 81, Reg. 53.

Although this represents a substantial reduction in the time afforded to the judges to write a decision, the Chambers will be in a position to deliver more timely decisions because they will be limited to reviewing only that evidence directly relied upon by the parties in their written submissions. Importantly, this limited review of evidence, which stands in stark contrast to the approach taken by some Chambers to date,⁵²⁰ is consistent with the process envisioned by the drafters of the provisions governing the confirmation process.⁵²¹ Indeed, one of the lawyers intimately involved in the Rome Statute negotiations, David Scheffer, has observed that the Pre-Trial Chamber “should have access *only* to those documents that are required to satisfy the threshold requirement of providing sufficient evidence to establish substantial grounds,” stressing that the Pre-Trial Chamber “was never intended to be the trial chamber, where all relevant evidence is examined.”⁵²²

Furthermore, Pre-Trial Chambers will be able to work within the thirty-day time limit by writing shorter decisions dedicated solely to establishing whether the charges are “wholly unfounded.”⁵²³ This is important because, although the Chambers often stress at the outset of their confirmation decisions that the Article 61 standard is low,⁵²⁴ the extensive review of evidence and elaborate decisions produced by

⁵²⁰ See, e.g., *supra* n. 171 *et seq.* and accompanying text (explaining that the *Bemba* Pre-Trial Chamber required extensive pre-confirmation disclosure between the parties and that all evidence disclosed by shared with the Chamber to assist in its determination of “the truth”); *supra* n. 361 *et seq.* and accompanying text (explaining that the *Gbagbo* Pre-Trial Chamber adjourned the confirmation proceedings to request that the Prosecution supplement the evidence it submitted in support of the charges, insisting that the Prosecution present its “strongest possible case,” as opposed to simply sufficient evidence to establish substantial grounds to believe the charges).

⁵²¹ See *supra* n. 27 *et seq.* and accompanying text (explaining that a proposal that would have mandated that all disclosure be complete by confirmation was rejected by the drafters of the ICC’s Rules based on the view that “it is unnecessary for the Pre-Trial Chamber to undertake the more detailed disclosure exercise that will be necessary before the trial,” as “such a process is likely to be time-consuming and may delay the straightforward task of determining whether there is sufficient evidence to support the prosecution charges”).

⁵²² Scheffer, *supra* n. 24, at 153, 162. Scheffer led the United States’ delegation in the Rome Statute negotiations. See Fanny Benedetti, *et al.*, *NEGOTIATING THE INTERNATIONAL CRIMINAL COURT: NEW YORK TO ROME, 1994-1998* 106 (2013).

⁵²³ See *supra* n. 486 *et seq.* and accompanying text.

⁵²⁴ See, e.g., *Lubanga*, Decision on the Confirmation of Charges, *supra* n. 33, ¶ 37; *Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 35, ¶ 63.

these Chambers suggest otherwise.⁵²⁵ Again, the practice to date is inconsistent with the intentions of the drafters. As Scheffer explains:

[The] negotiators... in Rome did not seek a [Pre-Trial Chamber] that itself would become the investigatory engine of the Court. That would have... tilted the ICC too far in the direction of the type of civil law court that relies heavily on the role of an investigating judge and minimizes the [P]rosecutor's functions. The balance was critical; the Prosecutor has to meet evidentiary standards and thresholds for warrants of arrest and indictments while the [Pre-Trial Chamber] stands as the reasoned gatekeeper, ensuring that the Prosecutor is not a zealot, that he or she proves reasonable or substantial grounds based on the evidence (depending on what is being sought), and that he or she stands on solid legal reasoning before the gate is opened by the [Pre-Trial Chamber] judges.... The [Pre-Trial Chamber] has *a limited* but vital purpose that demands professional due diligence by the Prosecutor.... The best-case scenario would have the Prosecutor using his or her discretion cautiously and responsibly and within the parameters set by the [Pre-Trial Chamber], *which itself acts within its statutory boundaries*.⁵²⁶

In sum, the role of the Pre-Trial Chambers is to “focus the Prosecutor on the *requirement of minimal evidence* to meet the sufficiency standard for the remaining charges.”⁵²⁷ If this role is in fact adopted by the Pre-Trial Chambers, issuing a decision within thirty days will not be problematic. At the same time, shorter confirmation decisions are more likely to make clear exactly which facts and circumstances have

⁵²⁵ See, e.g., Cassese & Gaeta, *supra* n. 492, at 369 (“The thorough review of evidence reflected in the confirmation decisions demonstrate... that the ‘substantial grounds to believe’ standard is anything but a trifle.”); Safferling, *supra* n. 424, at 337-38 (“Does [the confirmation hearing] consist of a ‘mini-trial,’ with a full in-depth evaluation of the evidence? The Pre-Trial Chambers have acted as though this was indeed intended... The in-depth analysis of the evidence carried out by the Pre-Trial Chambers... equals that of a Trial Chamber’s judgment concerning the guilt of the accused.”).

⁵²⁶ Scheffer, *supra* n. 24, at 153 (emphasis added).

⁵²⁷ *Id.* at 155.

been confirmed by the Pre-Trial Chamber,⁵²⁸ while minimizing the risk of inappropriately influencing the Trial Chamber ultimately charged with determining the guilt of the accused.⁵²⁹ Finally, if the Pre-Trial Chambers truly apply the minimal standard they often espouse in theory, the parties could adjust their own approach to the confirmation process, rather than using the confirmation stage at a means of testing the cases they plan to litigate at trial.

In addition to shortening the time within which the Pre-Trial Chamber must issue its decision under Article 61(7), we recommend that a new regulation be adopted setting time limits in the event that one or both parties seek leave to appeal the decision. Specifically, limits should be established regarding the amount of time within which the Pre-Trial Chamber must respond to any requests for leave to appeal⁵³⁰ and, in the event leave is granted, the timing for the parties to submit briefs to the Appeals Chamber and the issuance of a decision by that chamber. Ideally, the process could be complete within a brief period of time,⁵³¹

⁵²⁸ See *supra* n. 474 and accompanying text (explaining that one of the recommendations of the independent panel of experts regarding the confirmation process was that the Pre-Trial Chambers make “clear what material facts have been confirmed and what they consist of exactly”).

⁵²⁹ See, e.g., Safferling, *supra* n. 424, at 337 (“Neither the Statute nor the Rules oblige the Pre-Trial Chamber to give a reasoned decision when confirming the charges, much less a decision of more than one hundred pages... Such extensive reasoning could... negatively influence the perception of the trial judges.”); Gauthier de Beco, *The Confirmation of Charges before the International Criminal Court: Evaluation and First Application*, 7 Int’l Crim. L. Rev. 469, 476 (2007) (“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).”).

⁵³⁰ As discussed in Section III of this report, and highlighted in the War Crimes Research Office’s report entitled *Expediting Proceedings at the International Criminal Court*, the Pre-Trial Chambers have regularly taken months to simply respond to a request from a party for leave to appeal an Article 61(7) decision. See War Crimes Research Office, *Expediting Proceedings at the International Criminal Court*, at 47 (June 2011),

<https://www.wcl.american.edu/warcrimes/icc/documents/1106report.pdf>.

⁵³¹ In the *Mbarushimana* case, an Appeals Chamber decision upholding the Pre-Trial Chamber’s decision declining to confirm any charges was issued two months after leave to appeal was granted. See *supra* n. 262 *et seq.* and accompanying text. While this was a relatively rapid time-frame for an Appeals Chamber judgment in the larger

although allowance may need to be made in the event other issues are pending before the Appeals Chamber at the time of the confirmation appeal.

context of the ICC, the summary confirmation process recommended elsewhere in this report should also lead to a quicker process in the event of an appeal.

V. CONCLUSION

As extensively documented in this report, the confirmation process as it has been practiced at the ICC to date has failed to conform with either the nature or the goals of the process as envisioned by the Rome Statute's drafters. While minor tweaks to the system have been recommended, it is clear that fundamental changes are required. At the same time, there is no justification for expanding the process, which is the approach that the Pre-Trial Chambers increasingly appear to be adopting. We therefore recommend significantly scaling back the confirmation process by requiring that it be conducted largely on the basis of written submissions and that it be completed within ninety days of a suspect's first appearance before the Court, absent exceptional circumstances. This could be achieved through a series of amendments to the ICC's Rules of Procedure and Evidence and Regulations of the Court, coupled with a basic shift in the approach of the Pre-Trial Chambers themselves regarding their role in the confirmation process. These changes will ensure that a decision by the Pre-Trial Chamber on whether to confirm charges is issued promptly after a suspect's initial appearance and, in the event charges are confirmed, that trial preparations may begin before the Trial Chamber in a timely manner.

ANNEX ONE: Dates Relevant to the Confirmation of Charges Process

Case		First Appearance	Confirmation Decision	Constitution of Trial Chamber
<i>Lubanga</i>		20 March 2006 ¹	29 January 2007 ²	6 March 2007 ³
<i>Katanga & Ngudjolo</i>		22 October 2007 ⁴ 11 February 2008 ⁵	30 September 2008 ⁶	24 October 2008 ⁷
<i>Bemba</i>		4 July 2008 ⁸	15 June 2009 ⁹	18 September 2009 ¹⁰
<i>Abu Garda</i>		18 May 2009 ¹¹	8 February 2010 ¹²	N/A
<i>Banda & Jerbo</i>		17 June 2010 ¹³	7 March 2011 ¹⁴	16 March 2011 ¹⁵
<i>Mbarushimana</i>		28 January 2011 ¹⁶	16 December 2011 ¹⁷	N/A
<i>Ruto, et al.</i>		7 April 2011 ¹⁸	23 January 2012 ¹⁹	29 March 2012 ²⁰
<i>Kenyatta, et al.</i>		8 April 2011 ²¹	23 January 2012 ²²	29 March 2012 ²³
<i>Ntaganda</i>		26 March 2013 ²⁴	9 June 2014 ²⁵	18 July 2014 ²⁶
<i>Gbagbo</i>		5 December 2011 ²⁷	12 June 2014 ²⁸	17 September 2014 ²⁹
<i>Bemba, et al.</i>	Bemba, Kilolo, Babala	27 November 2013 ³⁰	11 November 2014 ³¹	30 January 2015 ³²
	Mangenda	5 December 2013 ³³	11 November 2014 ³⁴	30 January 2015 ³⁵
	Arido	20 March 2014 ³⁶	11 November 2014 ³⁷	30 January 2015 ³⁸
<i>Blé Goudé</i>		27 March 2014 ³⁹	11 December 2014 ⁴⁰	20 December 2014 ⁴¹

¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-38 (Pre-Trial Chamber I, 17 March 2006).

² See generally *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803 (Pre-Trial Chamber I, 29 January

2007).

³ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Constituting Trial Chamber I and Referring to It the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01-04-01-06-842 (Presidency, 6 March 2007).

⁴ *The Prosecutor v. Germain Katanga*, Decision Scheduling the First Appearance of Germain Katanga and Authorizing Photographs at Hearing of 22 October 2007, ICC-01/04-01/07-26, at 3 (Pre-Trial Chamber I, 18 October 2007).

⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision of the Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-257, at 3 (Pre-Trial Chamber I, 10 March 2008) (discussing Ngudjolo's first appearance).

⁶ See generally *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, ICC-01/04-01/07-611 (Pre-Trial Chamber I, 1 October 2008).

⁷ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Constituting Trial Chamber II and referring to it the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-729 (Presidency, 24 October 2008).

⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 4 (Pre-Trial Chamber II, 15 June 2009).

⁹ See generally *id.*

¹⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Constituting Trial Chamber III and referring to it the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (Presidency, 18 September 2009).

¹¹ *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, ¶ 5 (Pre-Trial Chamber I, 8 February 2010).

¹² See generally *id.*

¹³ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of the "Decision on the Confirmation of Charges," ICC-02/05-03/09-121-CORR-RED, ¶ 13 (Pre-Trial Chamber I, 8 March 2011).

¹⁴ See generally *id.*

¹⁵ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision Constituting Trial Chamber IV and Referring to it the Case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-124 (Presidency, 16 March 2011).

¹⁶ *The Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, ¶ 14 (Pre-Trial Chamber I, 16 December 2011).

¹⁷ *The Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, ¶ 31 (Pre-Trial Chamber I, 16 December 2011).

¹⁸ *The Prosecutor v. Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, ¶ 4 (Pre-Trial Chamber II, 23 January 2012).

¹⁹ *The Prosecutor v. Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, ¶ 14 (Pre-Trial Chamber II, 23 January 2012).

²⁰ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision

Constituting Trial Chamber V and Referring to it the Case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-406 (Presidency, 29 March 2012).

²¹ *The Prosecutor v. Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, ¶ 4 (Pre-Trial Chamber II, 23 January 2012).

²² *The Prosecutor v. Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, ¶ 428 (Pre-Trial Chamber II, 23 January 2012).

²³ *The Prosecutor v. Muthaura, et al.*, Decision Constituting Trial Chamber V and Referring to it the Case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-414 (Presidency, 29 March 2012).

²⁴ *The Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, ¶ 2 (Pre-Trial Chamber II, 9 June 2014).

²⁵ *The Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, ¶ 97 (Pre-Trial Chamber II, 9 June 2014).

²⁶ *The Prosecutor v. Bosco Ntaganda*, Decision Constituting Trial Chamber VI and Referring to it the Case of *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-337 (Presidency, 18 July 2014).

²⁷ *The Prosecutor v. Laurent Gbagbo*, Decision on the Confirmation of Charges Against Laurent Gbagbo, ICC-02/11-01/11-656-Red, ¶ 266 (Pre-Trial Chamber I, 12 June 2014).

²⁸ *The Prosecutor v. Laurent Gbagbo*, Decision on the Confirmation of Charges Against Laurent Gbagbo, ICC-02/11-01/11-656-Red (Pre-Trial Chamber I, 12 June 2014).

²⁹ *The Prosecutor v. Laurent Gbagbo*, Decision re-constituting Trial Chamber I and referring to it the case of *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-682 (Presidency, 17 September 2014).

³⁰ *The Prosecutor v. Bemba, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, ¶ 4 (Pre-Trial Chamber II, 11 November 2014).

³¹ *The Prosecutor v. Bemba, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749 (Pre-Trial Chamber II, 11 November 2014).

³² *The Prosecutor v. Bemba, et al.*, Decision Constituting Trial Chamber VII and Referring to it the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13-805 (Presidency, 30 January 2015).

³³ *The Prosecutor v. Bemba, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, ¶ 4 (Pre-Trial Chamber II, 11 November 2014).

³⁴ *The Prosecutor v. Bemba, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749 (Pre-Trial Chamber II, 11 November 2014).

³⁵ *The Prosecutor v. Bemba, et al.*, Decision Constituting Trial Chamber VII and Referring to it the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13-805 (Presidency, 30 January 2015).

³⁶ *The Prosecutor v. Bemba, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, ¶ 4 (Pre-Trial Chamber II, 11 November 2014).

³⁷ *The Prosecutor v. Bemba, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749 (Pre-Trial Chamber II, 11 November 2014).

³⁸ *The Prosecutor v. Bemba, et al.*, Decision Constituting Trial Chamber VII and Referring to it the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13-805 (Presidency, 30 January 2015).

³⁹ *The Prosecutor v. Charles Blé Goudé*, Decision on the Confirmation of Charges against Charles Blé Goudé, ICC-02/11-02/11-186 (Pre-Trial Chamber I, 11 December 2015).

⁴⁰ *The Prosecutor v. Charles Blé Goudé*, Decision on the Confirmation of Charges against Charles Blé Goudé, ICC-02/11-02/11-186, ¶¶ 120, 182 (Pre-Trial Chamber I, 11 December 2014).

⁴¹ *The Prosecutor v. Charles Blé Goudé*, Corrigendum to the “Decision Referring the Case of *The Prosecutor v. Charles Blé Goudé* to Trial Chamber I”, ICC-02/11-02/11-193, 20 December 2014 (registered on 22 December 2014), ICC-02/11-02/11-193-Corr (Presidency, 20 December 2014).

ANNEX TWO: Dates Relevant to the Post-Confirmation, Pre-Trial Process

Case	Constitution of Trial Chamber	First Day of Trial
<i>Lubanga</i>	6 March 2007 ¹	26 January 2009 ²
<i>Katanga & Ngudjolo</i>	24 October 2008 ³	24 November 2009 ⁴
<i>Bemba</i>	18 September 2009 ⁵	22 November 2010 ⁶
<i>Ruto, et al.</i>	29 March 2012 ⁷	10 September 2013 ⁸
<i>Ntaganda</i>	18 July 2014 ⁹	2 September 2015 ¹⁰

¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Constituting Trial Chamber I and Referring to It the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01-04-01-06-842 (Presidency, 6 March 2007).

² *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/06-2842, ¶ 10 (Trial Chamber I, 14 March 2012).

³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Constituting Trial Chamber II and referring to it the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-729 (Presidency, 24 October 2008).

⁴ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Postponing the Date of the Commencement of the Trial (Rule 132(1) of the Rules of Procedure and Evidence), ICC-01/04-01/07-1442-tENG, ¶ 1 (Trial Chamber II, 31 August 2009).

⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Constituting Trial Chamber III and referring to it the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (Presidency, 18 September 2009).

⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defense Submission on the Trial Chamber's Notification under Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2365-Red, ¶ 6 (ICC Defense, 18 October 2012).

⁷ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision Constituting Trial Chamber V and Referring to it the Case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-406 (Presidency, 29 March 2012).

⁸ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Hearing (Open Session), ICC-01/09-01/11-T-27-ENG ET WT 10-09-2013 1-83-SZ T (10 September 2013).

⁹ *The Prosecutor v. Bosco Ntaganda*, Decision Constituting Trial Chamber VI and Referring to it the Case of *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-337 (Presidency, 18 July 2014).

¹⁰ International Criminal Court Press Release, *Ntaganda Trial Opens at International Criminal Court*, ICC-CPI-20150902-PR1143 (2 September 2015).

ANNEX THREE: Dates Relevant to the Entire Pre-Trial Phase

Case	First Appearance	First Day of Trial
<i>Lubanga</i>	20 March 2006 ¹	26 January 2009 ²
<i>Katanga & Ngudjolo</i>	22 October 2007 ³ 11 February 2008 ⁴	24 November 2009 ⁵
<i>Bemba</i>	4 July 2008 ⁶	22 November 2010 ⁷
<i>Ruto, et al.</i>	7 April 2011 ⁸	10 September 2013 ⁹
<i>Ntaganda</i>	26 March 2013 ¹⁰	2 September 2015 ¹¹

¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-38 (Pre-Trial Chamber I, 17 March 2006).

² *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/06-2842, ¶ 10 (Trial Chamber I, 14 March 2012).

³ *The Prosecutor v. Germain Katanga*, Decision Scheduling the First Appearance of Germain Katanga and Authorizing Photographs at Hearing of 22 October 2007, ICC-01/04-01/07-26, at 3 (Pre-Trial Chamber I, 18 October 2007).

⁴ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision of the Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-257, at 3 (Pre-Trial Chamber I, 10 March 2008) (discussing Ngudjolo's first appearance).

⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Postponing the Date of the Commencement of the Trial (Rule 132(1) of the Rules of Procedure and Evidence), ICC-01/04-01/07-1442-tENG, ¶ 1 (Trial Chamber II, 31 August 2009).

⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 4 (Pre-Trial Chamber II, 15 June 2009).

⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defense Submission on the Trial Chamber's Notification under Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2365-Red, ¶ 6 (ICC Defense, 18 October 2012).

⁸ *The Prosecutor v. Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, ¶ 4 (Pre-Trial Chamber II, 23 January 2012).

⁹ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Hearing (Open Session), ICC-01/09-01/11-T-27-ENG ET WT 10-09-2013 1-83-SZ T (10 September 2013).

¹⁰ *The Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, ¶ 2 (Pre-Trial Chamber II, 9 June 2014).

¹¹ International Criminal Court Press Release, *Ntaganda Trial Opens at International Criminal Court*, ICC-CPI-20150902-PR1143 (2 September 2015).

ANNEX FOUR: Dates Relevant to the Suspect's Wait Time for Potentially Exculpatory Evidence

Case		First Appearance	First Disclosure of Potentially Exculpatory Evidence
<i>Lubanga</i>		20 March 2006 ¹	31 March 2006 ²
<i>Katanga & Ngudjolo</i>	Katanga	22 October 2007 ³	28 February 2008 ⁴
	Ngudjolo	11 February 2008 ⁵	19 March 2008 ⁶
<i>Bemba</i>		4 July 2008 ⁷	1 October 2008 ⁸
<i>Abu Garda</i>		18 May 2009 ⁹	24 August 2009 ¹⁰
<i>Banda & Jerbo</i>		17 June 2010 ¹¹	22 October 2010 ¹²
<i>Mbarushimana</i>		28 January 2011 ¹³	14 June 2011 ¹⁴
<i>Ruto, et al.</i>		7 April 2011 ¹⁵	28 June 2011 ¹⁶
<i>Kenyatta, et al.</i>		8 April 2011 ¹⁷	19 July 2011 ¹⁸
<i>Ntaganda</i>		26 March 2013 ¹⁹	27 May 2013 ²⁰
<i>Gbagbo</i>		5 December 2011 ²¹	3 April 2012 ²²
<i>Bemba, et al.</i>	Bemba, Kilolo, Babala	27 November 2013 ²³	28 February 2014 ²⁴
	Mangenda	5 December 2013 ²⁵	28 February 2014 ²⁶
	Arido	20 March 2014 ²⁷	24 March 2014 ²⁸
<i>Blé Goudé</i>		27 March 2014 ²⁹	25 April 2014 ³⁰

¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Order Scheduling the First Appearance of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-38 (Pre-Trial Chamber I, 17 March 2006).

² *The Prosecutor v. Thomas Lubanga Dyilo*, Filing of Incriminating Evidence and Potentially Exculpatory Evidence, ICC-01/04-01/06-64, ¶4 (Pre-Trial Chamber I, 3 April 2006).

³ *The Prosecutor v. Germain Katanga*, Decision Scheduling the First Appearance of Germain Katanga and Authorizing Photographs at Hearing of 22 October 2007, ICC-01/04-01/07-26, at 3 (Pre-Trial Chamber I, 18 October 2007).

⁴ *The Prosecutor v. Germain Katanga*, Prosecution's Communication of Potentially Exculpatory Evidence Disclosed to the Defence on 28 February 2008, ICC-01/04-01/07-243 (Pre-Trial Chamber I, 29 February 2008).

⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision of the Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-257, at 3 (Pre-Trial Chamber I, 10 March 2008) (discussing Ngudjolo's first appearance).

⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution's Communication of the Disclosure to the Defence of Mathieu Ngudjolo Chui of All Evidentiary Material Previously Disclosed to the Defence of Germain KATANGA, ICC-01/04-01/07-337, ¶1 (Pre-Trial Chamber I, 20 March 2008).

⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 4 (Pre-Trial Chamber II, 15 June 2009).

⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 1 October 2008, ICC-01/05-01/08-133 (Pre-Trial Chamber III, 1 October 2008).

⁹ *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, ¶ 5 (Pre-Trial Chamber I, 8 February 2010).

¹⁰ *The Prosecutor v. Bahar Idriss Abu Garda*, Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 24 August 2009, ICC-02/05-02/09-65 (Pre-Trial Chamber I, 25 August 2009).

¹¹ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of the "Decision on the Confirmation of Charges," ICC-02/05-03/09-121-CORR-RED, ¶ 13 (Pre-Trial Chamber I, 8 March 2011).

¹² *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Prosecution's Communication of Incriminating and Potentially Exculpatory Evidence Disclosed to the Defence on 12 and 22 October and 5 November 2010, ICC-02/05-03/09-94 (Pre-Trial Chamber I, 9 November 2010).

¹³ *The Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, ¶ 14 (Pre-Trial Chamber I, 16 December 2011).

¹⁴ *The Prosecutor v. Callixte Mbarushimana*, Prosecution's First Communication of a Disclosure Note, ICC-01/04-01/10-233 (Pre-Trial Chamber I, 14 June 2011).

¹⁵ *The Prosecutor v. Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, ¶ 4 (Pre-Trial Chamber II, 23 January 2012).

¹⁶ *The Prosecutor v. Ruto, et al.*, Prosecution's First Communication of Potentially Exculpatory Evidence to the Defence, ICC-01/09-01/11-149 (Pre-Trial Chamber II, 28 June 2011).

¹⁷ *The Prosecutor v. Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, ¶ 4 (Pre-Trial Chamber II, 23 January 2012).

¹⁸ *The Prosecutor v. Muthaura, et al.*, Prosecution's First Communication to the Defence of Redacted Incriminating Evidence Pursuant to Article 61(3)(b),

Potentially Exculpatory Evidence Pursuant to Article 67(2) and Material Subject to Disclosure Pursuant to Rule 77, ICC-01/09-02/11-179-Conf (Pre-Trial Chamber II, 19 July 2011).

¹⁹ *The Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, ¶ 2 (Pre-Trial Chamber II, 9 June 2014).

²⁰ *The Prosecutor v. Bosco Ntaganda*, Prosecution's communication of the disclosure of evidence, ICC-01/04-02/06-68, ¶6 (Pre-Trial Chamber II, 28 May 2013).

²¹ *The Prosecutor v. Laurent Gbagbo*, Decision on the Confirmation of Charges Against Laurent Gbagbo, ICC-02/11-01/11-656-Red, ¶ 266 (Pre-Trial Chamber I, 12 June 2014).

²² *The Prosecutor v. Laurent Gbagbo*, Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 3 April 2012, ICC-02/11-01/11-82 (Pre-Trial Chamber III, 3 April 2012).

²³ *The Prosecutor v. Bemba, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, ¶ 4 (Pre-Trial Chamber II, 11 November 2014).

²⁴ *The Prosecutor v. Bemba, et al.*, Prosecution's Communication of Incriminatory Evidence, Rule 77 and Potentially Exculpatory Materials Disclosed to the Defence on 28 February 2014, ICC-01/05-01/13-229 (Pre-Trial Chamber II, 28 February 2014).

²⁵ *The Prosecutor v. Bemba, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, ¶ 4 (Pre-Trial Chamber II, 11 November 2014).

²⁶ *The Prosecutor v. Bemba, et al.*, Prosecution's Communication of Incriminatory Evidence, Rule 77 and Potentially Exculpatory Materials Disclosed to the Defence on 28 February 2014, ICC-01/05-01/13-229 (Pre-Trial Chamber II, 28 February 2014).

²⁷ *The Prosecutor v. Bemba, et al.*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, ¶ 4 (Pre-Trial Chamber II, 11 November 2014).

²⁸ *The Prosecutor v. Bemba, et al.*, Prosecution's Communication of Incriminatory Evidence, Rule 77 and Potentially Exculpatory Material Disclosed to the Defence of Narcisse Arido on 24 March 2014, ICC-01/05-01/13-291 (Pre-Trial Chamber II, 24 March 2014).

²⁹ *The Prosecutor v. Charles Blé Goudé*, Decision on the Confirmation of Charges against Charles Blé Goudé, ICC-02/11-02/11-186 (Pre-Trial Chamber I, 11 December 2015).

³⁰ *The Prosecutor v. Charles Blé Goudé*, Prosecution's Communication of Evidence Disclosed to the Defence on 25 April 2014, ICC-02/11-02/11-65 (Pre-Trial Chamber I, 25 April 2014).

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THE CONFIRMATION OF CHARGES PROCESS AT THE INTERNATIONAL CRIMINAL COURT: A CRITICAL ASSESSMENT AND RECOMMENDATIONS FOR CHANGE

Article 61 of the Rome Statute establishing the International Criminal Court (ICC) creates a process unique among international criminal bodies: the confirmation of charges process. Specifically, the article provides that, prior to committing a suspect to trial before the Court, a Pre-Trial Chamber of the ICC shall hold a hearing to assess whether the Prosecution has presented sufficient evidence to establish substantial grounds to believe that the suspect bears responsibility for the charged crime or crimes. In theory, the confirmation process is intended to achieve several goals, including ensuring prosecutorial fairness and efficiency, protecting the rights of the suspect, and promoting judicial economy. However, as evidenced in the review in this report of the twelve confirmation hearings held at the ICC to date, in practice, the process has fallen far short of achieving these goals.

Given the disconnect between the intended goals of the confirmation process and the way the process has played out in practice, it is clear that changes to the system are in order. While some attempts have been made both from within and outside of the Court to improve the Article 61 process in recent years, these initiatives have either been too minor in scope or have tended towards an expansion of the confirmation process, which would likely exacerbate several of the problems identified in this report. We therefore recommend a fundamental change in the approach to the confirmation process by significantly scaling back the proceedings in a way that realigns the confirmation process with the intent of the Rome Statute's drafters. Specifically, we recommend requiring that the confirmation process be conducted primarily on the basis of written submissions and that it be completed within ninety days of a suspect's first appearance before the Court, absent exceptional circumstances. As detailed in the report, this could be achieved through a series of amendments to the ICC's Rules of Procedure and Evidence and Regulations of the Court, coupled with a basic shift in the approach of the Pre-Trial Chambers regarding their role in the confirmation process.



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