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PRE-TRIAL PRACTICE MANUAL

September 2015

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Why this Pre-Trial Practice Manual?

The present manual is the product of discussions held among the Judges of the Pre-Trial Division – Judges Marc Perrin de Brichambaut, Antoine Kesia-Mbe Mindua, Péter Kovács, Chang-ho Chung and myself – since April 2015 with a view to identifying solutions to challenges faced in the first years of the Court and build on the experience acquired so far. Indeed, after more than 10 years of axtivity, it was considered vital to reflect on the at times inconsistent practice of the different Pre-Trial Chambers, and record what has been identified as best practice to be followed in pre-trial proceedings.

The manual is first and foremost directed at the Pre-Trial Judges themselves, while certain issues are also of relevance to the trial stage of the case, and therefore of interest to the Judges of the Trial Division. It also states the expectations that pre-trial Judges have from the Prosecutor and Defence counsel. The final goal of the manual is therefore to contribute to the overall effectiveness and efficiency of the proceedings before the Court.

The manual was presented to and shared with all Judges of the Court in advance of the Judges' retreat that took place in Nuremberg, Germany, from 18 to 21 June 2015. At the retreat, after discussion, the Judges endorsed the manual and recommended that it be made public as soon as possible.

Needless to say, this manual is a living document. It will be updated, integrated, amended as warranted by any relevant development and therefore the Judges of the Pre-Trial Division will meet on a regular basis in order to discuss the need for any such update. The first update will concern issues with respect to the modalities of victims' applications for participation in the proceedings and the procedure for their admission, on which the Judges of the Division are currently working together with the other Judges of the Court.

Thanks to the colleagues of Pre-Trial Division I have the honour to preside and to the staff members of the Division for their valuable contribution to the preparation of this manual.

Cuno Tarfusser

President of the Pre-Trial Division

I. Issuance of a warrant of arrest/summons to appear

1. *The* ex parte *nature of proceedings under article 58*

The application of the Prosecutor under article 58 of the Statute and the decision of the Pre-Trial Chamber are submitted and issued *ex parte*. Even if the proceedings are public (which is however not recommended), the person whose arrest/appearance is sought does not have standing to make submissions on the merits of the application.

2. *The warrant of arrest/summons to appear*

A warrant of arrest/summons to appear should be issued as a single, concise document, by which the arrest of the person is ordered or the person is summoned to appear before the Court at a specified date and time, respectively. Its content is regulated by article 58(3) of the Statute, which states that it shall contain: (i) the name of the person and any other relevant identifying information; (ii) a specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and (iii) a concise statement of the facts which are alleged to constitute those crimes. Any detailed discussion of the evidence or analysis of legal questions is premature at this stage and should be avoided.

If the person presumably speaks either of the working languages of the Court (English or French), and/or, if applicable, the language of the State on the territory of which the person might be found is either of these languages, the warrant of warrant of arrest/summons to appear should preferably be issued directly in such working language.

On the basis of the warrant of arrest, the Registrar, in consultation with the Prosecutor, transmits a request for arrest and surrender under articles 89 and 91 of the Statute to any State on the territory of which the person may be found. As recently instructed by the Judges of the Pre-Trial Division, every time that information of travel into the territory of a State Party, whether planned or ongoing, of a person at large who is the subject of a warrant of arrest is related to the Court or one of its organs, the Registrar shall transmit to the concerned State Party a request for arrest or surrender of the person or, in case such request has already been transmitted, a *note verbale* containing a reminder of the State's obligation to cooperate with the Court in the arrest and surrender of that person. In case the person at large is expected to travel into the territory of a non-State Party, the Registrar shall request the State's cooperation in the arrest and surrender of the person, informing or reminding it that it may decide to provide assistance to the Court in accordance with article 87(5)(a) of the Statute with regard to the arrest and surrender to that person, or reminding the State of any obligation arising from any Security Council resolution

referring the situation to the Prosecutor, in case any such obligation has been imposed.

II. The first appearance

1. Timing of the first appearance

The person's first appearance before the Chamber or the Single Judge, in accordance with article 60(1) of the Statute and rule 121(1) of the Rules, should normally take place within 48 to 96 hours after arrival at the seat of the Court upon surrender, or on the date specified in the summons to appear.

2. Language that the person fully understands and speaks

Under article 67(1)(a) of the Statute, the person proceeded against has the right to be informed of the nature, cause and content of the charge in a language which they fully understand and speak.

Even if not raised by the parties, the Pre-Trial Chamber should verify at the first appearance that the person fully understands and speaks a working language, or determine what other language the person fully understands and speaks. In cases of controversy, a report of the Registrar can be ordered. The meaning of "fully understands and speaks" needs to be further refined in practice.

3. The right to apply for interim release

Article 60(1) of the Statute expressly mentions that, at the first appearance, the Pre-Trial Chamber must be satisfied that the person has been informed of the right to apply for interim release pending trial.

The Pre-Trial Chamber should specifically inform the person of this right. This is important because periodic review of detention does not start unless the Defence makes its first application for interim release (*i.e.* the 120-day time limit under rule 118(2) runs from the Chamber's ruling on any such application). Applications for interim release should be disposed of as a matter of urgency and, ordinarily, decided within 30 days.

4. The date of the confirmation hearing

According to rule 121(1) of the Rules, at the first appearance, the Pre-Trial Chamber shall set the date of the confirmation hearing. The typical target date for the confirmation hearing should be around 4-6 months from the first appearance. Efforts

should be made to reduce the average time that passes between the first appearance and the commencement of the confirmation of charges hearing.

However, this depends on the circumstances of each particular case. In particular, it must be borne in mind that sometimes more time may be necessary in order to ensure that the pre-trial proceedings fully execute their mandate in the procedural architecture of the Court. Also, it may typically occur again that a person would be arrested and surrendered to the Court long time after the issuance of the warrant of arrest, reviving a case that would have been dormant for long. In these circumstances, giving more time to the Prosecutor in order to properly prepare the case should be considered. Indeed, in certain circumstances, allowing more time for the parties' preparation for the confirmation of charges hearing may have the counterintuitive consequence of making the proceedings more expeditious, as it would tend to avoid adjournments of the confirmation of charges hearing, other obstacles at the pre-trial stage and problems at the initial stage of the trial.

In this context, the Pre-Trial Chamber should consider that, as recognised by the Prosecutor herself, it would be desirable, as a matter of policy, that the cases presented by the Prosecutor at the confirmation hearing be as trial-ready as possible. This would allow the commencement of the trial, if any, within a short period of time after confirmation of the charges. Therefore, in setting the date of the confirmation hearing, the Pre-Trial Chamber should take into account that it is indeed preferable that, to the extent possible, the Prosecutor conduct before the confirmation process the investigative activities that he/she considers necessary. At the same time, the Chamber shall be mindful that the Appeals Chamber, in line with the system designed by the Court's legal instruments, held that the Prosecutor's investigation may be continued beyond the confirmation hearing, and determined that finding that, barring exceptional circumstances, the Prosecutor's investigations must be brought to an end before the confirmation hearing constitutes an error of law.

III. Proceedings leading to the confirmation of charges hearing

1. Review of the record of the case following the initial appearance

At the latest from the moment of the first appearance, the Defence acquires all procedural rights and becomes a party to proceedings that have thus far been conducted *ex parte*. For this reason, the Pre-Trial Chamber should conduct a review of the record of the case and make available to the Defence as many documents as possible, and, at a minimum, and without prejudice to the necessary protective measures, the Prosecutor's application under article 58 of the Statute and any accompanying documents.

2. *Time limit for responses under regulation 24 of the Regulations of the Court*

The general 21-day time limit for responses (see regulation 34(b) of the Regulations) is incompatible with the fast pace of pre-trial proceedings. In order to avoid delay and to pre-empt the need to issue numerous procedural orders shortening the general time limit, the Pre-Trial Chamber should order that, throughout the entire proceedings leading to the confirmation hearing, any responses shall be filed within five days, or within another appropriately short time limit. The power to make such order stems from the *chapeau* of regulation 34.

3. *Informal contact with the parties and the Registry*

In order to streamline proceedings, some minor or peripheral matters can be dealt with by email communication, reducing the need for written submissions and orders. Variation of time and page limits, or leave to reply, can often be decided in this way, and the party can then refer to the communication by email in its filing. Similarly, orders to the Registrar can regularly be given by way of email, such as to reclassify documents in the record or to submit reports on particular issues.

The Chamber should, however, make sure that no substantive litigation takes place by email, and should order the submission of formal filings in such cases.

4. *Victims' issues*

At the retreat in Nuremberg between 18 and 21 June 2015, the Judges agreed to create a working group to pursue harmonisation of practice across the proceedings with respect to the modalities of victims' applications for participation in the proceedings and the procedure for their admission. The present manual will be updated on these matters in light of the outcome of the work of the working group.

5. *Status conferences*

Pre-Trial Chambers should make full use of the possibility to hold status conferences with the parties. Oral orders and clarifications in relation to the conduct of the proceedings can be provided to the parties during such status conferences, increasing efficiency and eliminating the need for cumbersome written decisions. Parties' procedural requests can also be received, debated and decided at status conferences.

IV. Disclosure of evidence and communication to the Pre-Trial Chamber

1. Disclosure of evidence between the parties

Disclosure of evidence between the parties takes place through the Registry in accordance with the E-court protocol developed for this purpose. Until the E-court protocol is somehow codified, the current version of the E-court protocol should be put on the record of the case as soon as possible after the first appearance.

The Prosecutor has the duty to disclose to the Defence "as soon as practicable" and on a continuous basis, all evidence in his/her possession or control which he/she believes shows or tends to show the innocence of the person, or mitigate the guilt of the person or may affect the credibility of the prosecution evidence (cf. article 67(2) of the Statute), or is material to the preparation of the defence (cf. rule 77 of the Rules).

As far as the incriminating evidence is concerned, it is the Prosecutor's own choice to disclose to the Defence as much as he/she considers warranted. The disclosure of incriminating evidence by the Prosecutor is subject to the final time limit set out in rule 121(3) – *i.e.* 30 days before the confirmation hearing – and, in case of new evidence, in rule 121(5) – *i.e.* 15 days before the confirmation hearing.

Likewise, the Defence may disclose to the Prosecutor (and rely upon for the confirmation hearing) as much as it considers it necessary in light of its own strategy. The time limits for the Defence disclosure are set out in rule 121(6).

No submission of any "in-depth analysis chart", or *similia*, of the evidence disclosed can be imposed on either party.

The Chamber should advise the Defence to take full advantage of the disclosure proceedings at the pre-trial stage to enable adequate preparation for both pre-trial and trial stage. In this regard, the Defence may also be warned that, subject to consideration of the rights contained in article 67(1)(b) and (d) of the Statute, if the counsel of the Defence representing the person at the pre-trial stage is replaced by any new counsel for the trial stage, the new counsel may still be subject to strict scheduling of the date the commencement of trial.

2. Exceptions to disclosure in the form of redaction of information

Under rules 81(2) and (4) of the Rules, the Prosecutor may redact information from evidence disclosed to the Defence. In following with the practice developed by Trial Chambers, at least for certain standard categories of information (if not for all kinds of information) such redactions can be implemented without need for a prior authorisation of the Chamber, which is seized of the matter only upon challenge by

the Defence. In this case, the Prosecutor retains the burden of proof to justify the challenged redaction. For any redaction applied, the Prosecutor shall indicate the category by including in the redaction box the code corresponding to each category, unless such indication would defeat the purpose of the redaction.

Redaction of the identity of a witness (*i.e.* anonymity) at the pre-trial stage of the proceedings under rule 81(4) of the Rules must be specifically authorised upon motivated request by the Prosecutor. This applies also to non-disclosure of an entire item of evidence by the Prosecutor with the Defence not being informed of its existence.

3. Extent of communication of disclosed evidence to the Pre-Trial Chamber

According to rule 121(2)(c) of the Rules, all evidence disclosed between the parties "for the purposes of the confirmation hearing" is communicated to the Pre-Trial Chamber. This should be understood as encompassing 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.

Communication of evidence to the Pre-Trial Chamber, by way of Ringtail, shall take place simultaneously with the disclosure of such evidence. The evidence communicated to the Pre-Trial Chamber forms part of the record of the case, irrespective of whether it is eventually included in the parties' lists of evidence under rules 121(3) and (6) of the Rules.

Nevertheless, for its decision on the confirmation of charges the Pre-Trial Chamber considers only the items of evidence that are included in the parties' lists of evidence for the purpose of the confirmation hearing. The determination of what and how much to include in their respective lists of evidence falls within the discretion of each party.

Other items of evidence that were communicated to the Pre-Trial Chamber but have not been included in the lists of evidence could only 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.

V. The charges

1. The factual basis of the charges

The Prosecutor may expand the factual basis of the charges beyond that for which a warrant of arrest or a summons to appear was issued.

However, the Pre-Trial Chamber must ensure that the Defence be given adequate time to prepare (cf. article 67(1)(b) of the Statute providing that the person has the right "[t]o have adequate time and facilities for the preparation of the defence"). While rule 121(3) of the Rules establishes the presumption that 30 days between the presentation of the detailed description of the charges and the confirmation are sufficient, the Pre-Trial Chamber may order, in light of the particular circumstances of each case, that the Defence be informed, by way of a formal notification in the record of the case, of the intended expanded factual basis of the charges in order not to be confronted at the last possible moment with unforeseen factual allegations in respect of which the Defence could not reasonably prepare. This advance notice – to be made by way of a short filing – would include only, and no more than, a concise statement of the relevant facts, *i.e.* the time, location and underlying conduct of the crimes with which the Prosecutor will charge the suspect. The detailed description of the charges exhaustively setting out the material facts and circumstances would, in any case, be provided in the document containing the charges 30 days before the confirmation hearing. How much in advance before the confirmation hearing any advance notice of the charges would need to be provided will depend on the particular circumstances of each case, including the total amount of time foreseen between the person's initial appearance and the confirmation hearing and the extent of the proposed expansion of the factual basis of the case. Failure to provide such notice within the time frame set by the Pre-Trial Chamber would make impermissible the bringing of any charges going beyond the factual basis of the warrant of arrest or summons to appear in the particular confirmation proceedings, without prejudice to these other charges being brought as part of new or other proceedings conducted separately.

Such notice would also constitute the basis for the Pre-Trial Chamber to request in time, through the Registrar, that the surrendering State provides a waiver of the rule of speciality under article 101 of the Statute, if applicable (*i.e.* if the person was surrendered to the Court), as well as the basis for the admission of victims of the alleged crimes to participate in the proceedings.

2. *Distinction between the charges and the Prosecutor's submissions in support of the charges*

The charges on which the Prosecutor intends to bring the person to trial to be presented prior to the confirmation hearing (cf. article 61(3)(a) of the Statute) shall be spelt out in a clear, exhaustive and self-contained way and shall include all, and not more than, the "material facts and circumstances" (*i.e.* the facts and circumstances that must be described in the charges (cf. article 74(2) of the Statute) and which are the only facts subject to judicial determination to the applicable standard of proof at confirmation and trial stages, respectively) and their legal characterisation.

There shall be no confusion between the material facts described in the charges and the "subsidiary facts" (*i.e.* those facts that are relied upon by the Prosecutor as part of his/her argumentation in support of the charges and, as such, are functionally "evidence"). Indeed, the Prosecutor may present submissions by which he/she proposes a narrative of the relevant events and an analysis of facts and evidence in order to persuade the Pre-Trial Chamber to confirm the charges. However, these submissions in support of the charges should not be confused with the charges. These submissions/argumentation can be included either in the same document containing the charges or in a separate filing (a sort of a "[pre-]confirmation brief"). If the Prosecutor chooses to include submissions in the document containing the charges rather than in a separate filing, the two sections – "charges" and "submissions" – must be kept clearly separate, and no footnotes containing cross-references or reference to evidence must be included in the charges.

The Pre-Trial Chamber may remedy defects in the formulation of the charges either *proprio motu* or upon request by the Defence, by instructing the Prosecutor to make the necessary adjustments. The Defence may bring any formal challenge to the charges – *i.e.* challenges which do not touch upon the merits of the charges and do not require consideration of the evidence – at the latest as procedural objections under rule 122(3) of the Rules prior to the opening of the confirmation hearing on the merits.

In any case, the Pre-Trial Chamber shall bear in mind that the decision on what to charge, as well as on how the charges shall be formulated, is fully within the responsibility of the Prosecutor. The Pre-Trial Chamber's interference with the charges by ordering the Prosecutor to remedy any identified deficiency should be strictly limited to what is necessary to make sure that the suspect is informed in detail of the nature, cause and content of the charge (cf. article 67(1)(a) of the Statute). This will necessarily depend on the particular circumstances of each case. In particular, the required specificity of the charges depends on the nature of the case, including the degree of the immediate involvement of the suspect in the acts fulfilling the material elements of the crimes, and no threshold of specificity of the charges can be established *in abstracto*. What the Pre-Trial Chamber must verify is that the charges enable the suspect to identify the historical event(s) at issue and the criminal conduct alleged, in order to defend him- or herself.

At the commencement of the confirmation hearing on the merits, any questions on the form, completeness or clarity of the charges must be settled. If the Defence does not raise any challenge to the format of the charges at the latest as procedural objections under rule 122(3) of the Rules, it is precluded to raise it at a later stage, being the confirmation hearing or the trial.

VI. The confirmation hearing

1. Presentation of evidence for the purposes of the confirmation hearing

The parties' respective lists of the evidence relied upon for the confirmation hearing (rule 121(3) and (6) of the Rules) shall indicate the items of evidence consecutively in any clear order, for instance by ERN or by categories of evidence (with, *e.g.*, statements/transcripts grouped by witness, official documents grouped by source, etc.). In order to serve its purpose, a list of evidence should not be presented in the form of a chart linking the factual allegations of the Prosecutor and the evidence submitted in support thereof.

The inclusion, in the Prosecutor's submissions for the purpose of the confirmation hearing (and possibly in any Defence submission under rule 121(9) of the Rules) of footnotes itemising the evidence supporting a factual allegation – preferably with hyperlinks to Ringtail – is encouraged.

No footnote (whether internal cross-references or hyperlinks to the evidence) can be included in the charges, as they shall be fully self-contained and shall exhaustively set out all, and no more than, the material facts and their legal characterisation. As stated above, how the Prosecutor's evidence substantiates the charges belongs to the "submissions" part, not to the "charges" section. This applies regardless of whether the Prosecutor decides to include his/her submissions in the document containing the charges or in a separate filing.

It is up to the parties to determine the best way to persuade the Chamber: there is no basis for the Chamber to impose on the parties a particular modality/format to argue their case and present their evidence. For example, no submission of any "in-depth analysis chart", or *similia,* of the evidence relied upon for the purposes of the confirmation hearing can be imposed on either of the parties.

2. Live evidence at the confirmation hearing

Use of live evidence at the confirmation hearing should be exceptional and should be subject to specific authorisation by the Pre-Trial Chamber. The parties must satisfactorily demonstrate that the proposed oral testimony cannot be properly substituted by a written statement or other documentary evidence.

3. Procedural objections to the pre-confirmation hearing proceedings

Under rule 122(3) of the Rules, the Prosecutor and the Defence, prior to the opening of the confirmation hearing on the merits, may "raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing".

As clarified above, formal challenges by the Defence to the charges – *i.e.* challenges which do not touch upon the merits of the charges and do not require consideration of the evidence – fall within the scope of the procedural objections under rule 122(3) of the Rules as they relate to the respect of the person's right to be properly notified of the charges. Procedural objections under rule 122(3) of the Rules may also include, for examples, challenges as to the proper time given for the parties' preparation for the confirmation hearing or to the exercise of disclosure obligations by the opposing party, including the propriety of redactions.

Decisions taken by the Pre-Trial Chamber on procedural objections under rule 122(3) become *res judicata* and are also to be considered as preparatory for the ensuing trial. The Pre-Trial Chamber's rulings under rule 122(3) which are joined, pursuant to rule 122(6), to the merits, will be set out in the operative part of the confirmation decision, including for easiness of retrieval by the parties and the Trial Chamber.

According to rule 122(4) of the Rules, "at no subsequent point may the objections and observations made under sub-rule 3 be raised or made again in the confirmation or trial proceedings". Arguably, the parties are precluded to raise at subsequent points (whether at confirmation or trial) procedural matters related to the proper conduct of the pre-trial proceedings prior to the confirmation hearing, also when they have chosen not to do it before the hearing on the merits is opened, while being in a position to do so.

4. The conduct of the confirmation hearing

The parties should be encouraged, as appropriate, to make use of the opportunity to lodge written submissions on points of fact and on law in accordance with rule 121(9) of the Rules in advance of the confirmation hearing. The filing of such written submissions presenting the full set of the parties' arguments on the merits of the charges would allow them to focus their oral presentations at the hearing to the issues that they consider most relevant. In order to properly organise the conduct of the confirmation hearing, the Pre-Trial Chamber should consider requesting that in these written submissions the parties also provide advance notice of any procedural objections or observations that they intend to raise at the beginning of the hearing pursuant to rule 122(3) of the Rules before the commencement of the hearing on the merits.

In any case, at the opening of the confirmation hearing, after the reading out of the charges as presented by the Prosecutor, the Presiding Judge will request the parties whether they have any procedural observations or objections with respect to the proper conduct of the proceedings leading to the confirmation hearing that they wish to raise under rule 122(3) of the Rules. The parties will be informed that no such matter might be raised at any subsequent point – whether at confirmation or at trial – if they choose not to do it before the hearing on the merits is opened.

As part of the confirmation hearing on the merits, the parties (and the participating victims) shall be allocated a certain amount of time in order to make their respective presentations, without the need that each and every item of evidence be rehearsed at the hearing. In any case, the Pre-Trial Chamber, for the decision on the confirmation of charges, will consider all the evidence that is included in the parties' lists of evidence, and, as explained above, any other evidence disclosed *inter partes* provided that the parties are given an opportunity to be heard on any such other item of evidence.

As soon as the parties (and the participating victims) finish with their respective oral presentations the Pre-Trial Chamber will consider whether it is appropriate to make a short adjournment (few hours or one/two days maximum) before the final observations under rule 122(8) of the Rules. In these final observations, the parties could only respond to each other's submissions: no new argument can be raised. After the final oral observations at the hearing, the confirmation hearing will be closed. No further written submissions from the parties and participants will be requested or allowed.

The 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 under rule 122(8) of the Rules.

VII. The confirmation decision

1. The distinction between the charges confirmed and the Pre-Trial Chamber's reasoning in support of its conclusions

According to article 61(7)(a) of the Statute, the Pre-Trial Chamber, when it confirms those charges in relation to which it has determined that there is sufficient evidence, "commit[s] the person to a Trial Chamber for trial on the charges as confirmed". In terms of the factual parameters of the charges, article 74(2) provides that the article 74 decision "shall not exceed the facts and circumstances described in the charges".

The charges on which the person is committed to trial are those presented by the Prosecutor (and on the basis of which the confirmation hearing was held) as confirmed by the Pre-Trial Chamber. Accordingly, the confirmation decision constitutes the final, authoritative document setting out the charges, and by doing so the scope of the trial.

The description of the facts and circumstances in the charges as confirmed by the Pre-Trial Chamber is binding on the Trial Chamber. Any discussion in terms of form of the charges (clarity, specificity, exhaustiveness, etc.) and in terms of their scope,

content and parameters ends with the confirmation decision, and no issues in this respect can be entertained by the Trial Chamber.

As clarified above, this requires that the charges presented by the Prosecutor and those finally confirmed by the Pre-Trial Chamber are clear and unambiguous, and that any procedural challenge to the formulation of the charges be brought before the Pre-Trial Chamber, at the latest, as objections under rule 122(3) of the Rules.

Correspondingly to the distinction between the charges presented by the Prosecutor and the Prosecutor's submissions in support of the charges, in the confirmation decision the charges confirmed by the Pre-Trial Chamber must be distinguished from the Chamber's reasoning in support of its findings.

In a decision confirming the charges the operative part shall reproduce *verbatim* the charges presented by the Prosecutor as confirmed by the Pre-Trial Chamber.

As already clarified, the charges presented by the Prosecutor, as confirmed by the Pre-Trial Chamber and reproduced in the operative part, set the parameters of the trial: after the charges are confirmed (in whole or in part) by the Pre-Trial Chamber there shall be no discussion or litigation at trial as to their formulation, scope or content. The binding effect of the confirmation decision is attached only to the charges and their formulation as reflected in the operative part of decision. No such effect is attached to the reasoning provided by the Pre-Trial Chamber to explain its final determination (narrative of events, analysis of evidence, reference to subsidiary facts, etc.). The subject-matter of the confirmation decision is limited to the charges only, and does not extend to the Prosecutor's argumentation/submissions as such, whether provided in the same document containing the charges or in a separate brief.

Findings on the substantial grounds to believe standard are made exclusively with respect to the material facts described in the charges, and there is no requirement that each item of evidence or each subsidiary fact relied upon by either party be addressed or referred to in the confirmation decision – nor would this be realistic or otherwise providing any benefit. In decisions confirming the charges, in order not to pre-determine issues or pre-adjudicate probative value of evidence which will be fully tested only at trial, the Pre-Trial Chamber should keep the reasoning strictly limited to what is necessary and sufficient for the Chamber's findings on the charges. Decisions declining to confirm the charges may require, depending on circumstances, a more detailed analysis, given that, as a result thereof, proceedings are terminated.

In a decision confirming the charges, the Pre-Trial Chamber may make the necessary adaptations to the charges in order to conform to its findings. By doing so, the Pre-Trial Chamber cannot expand the factual scope of the charges as presented by the

Prosecutor. Its interference should be limited to the deletion of, or adjustment to, any material fact that is not confirmed as pleaded by the Prosecutor. This must be done transparently and be clearly identifiable in the confirmation decision, by presenting the charges as formulated by the Prosecutor at the beginning of the confirmation decision and the charges as confirmed in its operative part.

2. The structure of the confirmation decision

It is fundamental that the structure of the confirmation decision makes clear the distinction between the Chamber's reasoning, on the one hand, and the Chamber's disposition as to the material facts and circumstances described in the charges and their legal characterisation as confirmed, on the other hand.

Typically a decision on the confirmation of charges should be structured as follows:

(i) The identification of the person against whom the charges have been brought by the Prosecutor.

(ii) The charges as presented by the Prosecutor.

(iii) A brief reference to the relevant procedural history of the confirmation proceedings.

(iv) Preliminary/procedural matters, including consideration of any procedural objections or observations raised by the parties under rule 122(3) of the Rules that the Pre-Trial Chamber, pursuant to rule 122(6) of the Rules, decided to join to the examination of the charges and evidence.

(v) Factual findings ("the facts"), in which the Pre-Trial Chamber provides a narrative of the relevant events (whether chronologically or otherwise), determining whether there are substantial grounds to believe with respect to the material facts and circumstances described in the charges presented by the Prosecutor, both in terms of the alleged criminal acts and the suspect's conduct. Reference to evidence (including to subsidiary facts) is made to the extent necessary and sufficient to support the factual findings on the material facts.

(vi) Legal findings ("the legal characterisation of the facts"), in which the Pre-Trial Chamber provides its reasoning as to whether the material facts of which it is satisfied to the required threshold constitute one or more of the crimes charged giving rise to the suspect's criminal responsibility under one or more of the forms of responsibility envisaged in the Statute and pleaded by the Prosecutor in the charges.

(vii) The operative part, the only part of the confirmation decision which is binding on the Trial Chamber. In a decision confirming the charges the operative part shall reproduce *verbatim* the charges presented by the Prosecutor that are confirmed by the Pre-Trial Chamber (both the material facts and circumstances described in the charges confirmed and the confirmed legal characterisation(s)). No footnote or cross-reference shall be added. The operative part should also include the Pre-Trial Chamber's decision on any procedural objections or observations addressed before the determination of the merits.

3. Alternative and cumulative charges

In the charges, the Prosecutor may plead alternative legal characterisations, both in terms of the crime(s) and the person's mode(s) of liability. In this case, the Pre-Trial Chamber will confirm alternative charges (including alternative modes of liability) when the evidence is sufficient to sustain each alternative. It would then be the Trial Chamber, on the basis of a full trial, to determine which one, if any, of the confirmed alternative is applicable to each case. This course of action should limit recourse to regulation 55 of the Regulations, an exceptional instrument which, as such, should be used only sparingly if absolutely warranted. In particular, it should limit the improper use of regulation 55 immediately after the issuance of the confirmation decision even before the opening of the evidentiary debate at trial.

The Prosecutor may also present cumulative charges, *i.e.* crimes charged which, although based on the same set of facts, are not alternative to each other, but may all, concurrently, lead to a conviction. In this case, the Pre-Trial Chamber will confirm cumulative charges when each of them is sufficiently supported by the available evidence and each crime cumulatively charged contains a materially distinct legal element. In doing so, the Pre-Trial Chamber will give deference to the Trial Chamber which, following a full trial, will be better placed to resolve questions of concurrence of offences.

VIII. Transfer of the case from pre-trial to trial

1. The continuation at trial of "systems" adopted at pre-trial

As concerns certain specific more technical aspects of proceedings (*e.g.* modalities of disclosure of evidence between the parties, including registration in the e-Court system; procedure for authorisation of exceptions to disclosure, including implementation of redactions under rules 81(2) and (4); modalities of victims' applications for participation in the proceedings and procedure for their admission; regime for the parties' handling of confidential information and contact with

witnesses of the opposing party) the Pre-Trial Chamber will set up regimes that are capable of being applied throughout the proceedings.

Considering that nothing in the procedural system of the Court precludes the continued validity of procedural orders of the Pre-Trial Chamber after the transfer of the case to a Trial Chamber, such procedural regimes should continue to apply, subject to necessary adjustments by the Trial Chamber. This will simplify proceedings and make them more efficient.

2. The record transmitted to the Trial Chamber

Following confirmation of charges and the assignment of the case to a Trial Chamber, the record is transmitted to the Trial Chamber pursuant to rule 130 of the Rules. This includes all evidence which has become part of the record by way of its communication to the Pre-Trial Chamber following *inter partes* disclosure (cf. also rule 121(10) of the Rules).

Considering that the evidence would then be individually considered for formal admission during trial, its inclusion in the record of proceedings before professional judges is not problematic. The transmission of the complete record with all its contents is also the preferred solution because of its simplicity.