A CRITIQUE OF THE INTERNATIONAL CRIMINAL COURT ON ITS DECISION. A CASE STUDY OF THE AFRICAN PERSPECTIVE

BY

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DECLARATION

I, Isabirye Emmanue declare to the best of my knowledge that this research report is truly my original and has not been submitted in the fulfillment for any award of a degree in any other Institution of Higher Learning or University, so it is entirely out of my own efforts.

Signature ..... Date 2nd/07/2019

APPROVAL

This is to certify that this research report is done under my supervision and it is now ready for submission to the school of Law, Kampala International University with my approval.

Signature ..... **Date** .....

DEDICATION

This research is dedicated with love and gratitude to my brothers Balidawa Clement and Mpaata Collin, my mother Namusobya Harriet whose abundant love, tolerance and deep understanding have sustained me throughout my life. It is due to their love, work ethics; integrity that have been invaluable for my existence and wellbeing. Let it be inspirational to you.

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Lastly, I am grateful to my course mates for their continuous support throughout my education.

LIST OF CASES

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

ii. Prosecutor v Bahr Idress Abu Garda, ICC-02/05-02/09

iii. Dominic Ongwen & others V International Criminal Court in the Hague January 26, 2015

LIST OF INSTRUMENTS

i. Rome Statute of the International Criminal Court UN Doc A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, available at http://www.un.org/law/icc/statute/romefra.htm [accessed 5 February 2010]

ii. The Convention for the Prevention and Punishment of Terrorism and the Convention

iii. The Geneva Convention

iv. The Convention Against Torture (CAT

v. The American Convention on Human Rights

vi. The European Convention on Human Rights

LIST OF ACRONYMS

AU	African Union
CAR	Central African Republic
CAT	Convention Against Torture
EU	European Union
ICC	International Criminal Court
ICCPP	Court's Protection Programme
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
NGOs	Non-Government Organizations
OPCV	Office of Public Counsel for Victims
SC	United Nations Security Council
VWU	Victims and Witnesses Unit
VWU's	Victims and Witnesses Unit's

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ABSTRACT

The study examined the International criminal court on African Perspective to examine the international criminal court proceedings under part v of the Rome Statute (investigation and prosecution) and proposals for amendments. One of the main reasons for the need of an ICC was achieve justice for all. There have been many instances of crimes against humanity and war crimes for which no individuals have been held accountable. In Cambodia in the 1970s, an estimated 2 million people were killed by the Khmer Rouge. In armed conflicts in Mozambique, Liberia, El Salvador and other countries, there has been tremendous loss of civilian life, including horrifying numbers of unarmed women and children. Massacres of civilians continue in Algeria and the Great Lakes region of Africa.

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence.

CHAPTER ONE

1.0 Introduction

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

The evaluation of Part V of the *Rome Statute* is presented in two sections. The first section consists of an overview of Part V provisions in light of the jurisprudence of the Pre-Trial Chamber. It focuses on the evolving roles of the Prosecutor and the Pre-Trial Chamber during the investigative phase and on the predominance of the Pre-Trial Chamber in the charging phase. The second part critically appraises the merits of recently published proposals for reforming Pre-Trial Chamber proceedings in light of the experience gained. This section also includes my own suggestions for reform. The adoption of regulations is suggested as an efficient avenue to address deficiencies relating to the disclosure of (1) arrest warrant materials and (2) the proposed charges. Amendments would limit the discretion given to Pre-Trial Chambers to conduct their own investigation of evidence which is not exculpatory and is not relied on by the parties, with the goal of ensuring equal treatment and equal justice for persons appearing before different Pre-Trial Chambers.

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

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

[3] *Prosecutor v Bahr Idress Abu Garda,* ICC-02/05-02/09.

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

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

1.1 Background of the study

In order to assess the role of domestic courts in prosecuting international crimes, some preliminary observations concerning the International Criminal Court (ICC) and its background are necessary. Efforts to establish an international criminal court date back over 80 years to the intended prosecution of the German Kaiser at the end of World War I. In 1937, the Convention for the Prevention and Punishment of Terrorism and the Convention for the Creation of an International Criminal Court were drafted by the League of Nations, but neither ever came into force. These marked the first in a series of failed attempts until the eventual coming into force of the Rome Statute in July 2002. The Statute has now been ratified by 111 states inclusive of all of South America, Europe and more than half of the 54 African states. Three states have "unsigned": the United States, Israel and Sudan.

The intention of the ICC is to provide a legal mechanism, not for the prosecution of the losers of war, but for peace time. The experience of the Nuremberg and Tokyo tribunals had been very much perceived as "victor's justice", with Americans notably absent from the list of defendants (what about the bombing of Hiroshima?).

African states played an invaluable role in ensuring that the Rome Conference negotiations succeeded and were among the first to ratify the Rome Statute (Senegal being the very first state to do so). Additionally, three of the situations currently before the Court were self-referred by states party to the Rome Statute: Uganda, the Democratic Republic of the Congo and Central African Republic. All of the situations currently under investigation by the ICC concern African states.

It must be remembered that Africa suffered greatly from the indignities of slavery and colonialism, and so can be touchy about being preached to, especially by former colonial oppressors. Thirty African states have now ratified the Rome Statute, and many have amended their domestic legislation to implement the complementarity regime, although fewer have adopted laws with respect to the cooperation requirements.

Although a comprehensive survey of the legislative approaches to the crimes provided for in the Rome Statute in the national legislation of member states of the African Union (AU) does not

exist, a survey commissioned by the AU within the context of engagement with the European Union (EU) on approaches on universal jurisdiction illustrates that jurisdiction over serious crimes of international concern is exercised pursuant to customary international law and the various relevant treaties. For example, with respect to the Geneva Convention, common law states have legislation incorporating the grave breaches provisions into national law. In some cases, this law remains the relevant colonial-era legislation; in others, the colonial legislation was re-enacted by the independent state. Certain African states with civil law systems have ratified the Geneva Conventions, and accept jurisdiction on this basis. Among these states are Algeria, Angola, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Gabon, Libya, the Republic of Congo and Tunisia. With respect to the Convention Against Torture (CAT), despite the fact that over half of AU member states are party to CAT, and are therefore obliged to establish universal jurisdiction over torture as defined in CAT, most have not enacted legislation to incorporate it into national law. Notable exceptions are Burundi, the Democratic Republic of the Congo and Cameroon, although different approaches have been taken.

The commitment on the part of AU member states to fighting impunity for serious crimes was clearly signaled in the Constitutive Act of the African Union[6] and subsequent AU resolutions, as well as regional pacts, such as the Pact on Security, Stability and Development in the Great Lakes Region (the Great Lakes Pact).[7] In addition, it has been given practical effect by means other than the exercise of universal jurisdiction including territorial jurisdiction in national courts, and ad hoc tribunals. Moreover, the Truth and Reconciliation Commission in South Africa and the gacaca courts in Rwanda provide examples of alternative justice mechanisms.

Given the upcoming Review Conference, there are a number of challenges faced by the ICC. For example, the apparent contradiction of Articles 27 and 98 pose a significant challenge to the functioning of universal jurisdiction. While Article 27 provides that the Rome Statute applies

[6] [Article 4(h) of the AU Statute affirms the right of the AU to "...intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity..."]

[7] [Article 8 of the Great Lakes Pact reads, in part:
The Member States, in accordance with the Protocol on the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, recognize that the crime of genocide, war crimes, and crimes against humanity are crimes under international law and against the rights of peoples, and undertake in particular: a) To refrain from, prevent and punish, such crimes;]

equally to all persons without any distinction based on official capacity, Article 98 requires the Court not to take any action that would result in violation by states of their international obligations to accord immunity to foreign states' officials. This is an issue on which legal scholars are divided.

A further challenge relates to the crime of aggression, provided for in Article 5(2) of the Rome Statute. The ICC cannot exercise jurisdiction until a definition has been agreed upon (by at least two-thirds of states parties) and adopted (by at least seven-eighths of the states parties). But even if a definition is agreed, there is a serious question about the appropriate trigger mechanism; there is a real concern that the United Nations Security Council (SC) is too politicised for this function. In response to a question about what other body would be in a position to refer cases of aggression to the ICC, it was stated that, given the role of the SC as the guardian of peace and security in the United Nations system, the SC should be best placed to fulfil this role. However, concerns about the SC's functioning have led to other suggestions, including the ICC Assembly of States Parties or the International Court of Justice (ICJ).

Moreover, given that the crime of aggression would target very senior government officials, there is a practical issue about whether countries would ever surrender their nationals for prosecution. And which situations may be investigated by the Court; should there be a requirement that the aggressor has accepted the Court's jurisdiction over the crime of aggression? These issues present serious questions about the functioning of the ICC. The argument that the exercise of jurisdiction by the court over the crime of aggression would politicise the court and in the process undermine it may prove to be an understatement and thus including the crime of aggression is undeniably a major challenge facing the ICC.

1.2 Problem statement

The ad hoc Tribunals were formed pursuant to Chapter VII actions of the United Nations Security Council.[8] Article 25 of the Charter of the United Nations *imposes a duty on all Member*

[8] Statute of the International Tribunal for the former Yugoslavia (1993) Security Council Resolution 827 (1993) on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian law Committed in the Territory of the Former Yugoslavia, (1993) *ILM* 1192; as amended by Security Council Resolution 1166 of 13 May 1998, available at http://www.un.org/icty/ [accessed 5 February 2010]. Statute of the International Criminal Tribunal for Rwanda (1994) Security Council Resolution 955

States 'to accept and carry out the decisions of the Security Council in accordance with the Charter.'[9] All States are therefore obligated to cooperate with the ad hoc Tribunals as an obligation erga omnes[10].

Article 89 provides that; 'The Court may transmit a request for the arrest and surrender of a person...to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person.'

1.3 Purpose of the study

The study will examine the assessment of the international criminal court on African Perspective

1.4 Research Objectives

To examine the international criminal court on African Perspective.

1.5 Scope of the study

The study will concentrate on international criminal court on African Perspective and in this case the scope will focus at geography, content and time scope.

1.5.1 Geographical scope

The research will focus specifically on international criminal court on African Perspective. It will also utilize experiences from other countries and cases.

Establishing the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, available at http://www.un.org/ictr [accessed 5 February 2010]

[9] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://www.unhcr.org/refworld/docid/3ae6b3930.html [accessed 5 February 2010].

[10] Obligations *erga omnes* are obligations recognized in international law as owed by States towards the community of States as a whole. See *Barcelona Traction case* [Belgium v. Spain] (Second Phase) ICJ Rep 1970 3 par 33 "...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. [at 34] Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."

1.5.2 Content scope

The study will be limited to the African perspectives on international criminal court. The Court has achieved considerable progress since it become operational in March 2003. However, these advances have faced manifold challenges: (inter alia) the lack of timely political will of the states Parties in enforcing the warrants of arrest issued by the Court; the complex nature of international criminal law, which is still in the making and lacks a general theory; and the different legal back- grounds and training of judges.

Professor Héctor olásolo has in recent years written thought-provoking essays which provide theoretical and practical problems arising from the interpretation and application of the Rome statue in situations and cases thus far before the Court. In each one of the chapters compiled in this publication the author delves into the doctrine, offering his vision on the scope of the ICC provisions, while contrasting them with national legislation and critically examining the most recent jurisprudence of the Pre-trial, trial and appeals Chambers of the ICC.

1.5.3 Time scope

The study covers a period of 2010 to 2019, to narrow the scope within which relevant legal issues are analyzed.

1.6 Doctrinal Methodology and Qualitative methodology

The study has analysied qualitative methodology[11], this methodology is aimed at description of the subject matter of the research.[12] By utilizing qualitative methodologies the research is able to evaluate both formal and normative aspects of the law relating to proceedings of international criminal court. The researcher has examined the work of scholars on proceedings of international criminal court in libraries textbooks and economic sources to gain understanding on the proceedings of international criminal court.

This study will utilize a descriptive approach as it will be necessary to observe and describe the

[11] Paul D. Leedy, Practical Research: Planning and Design, 11th Edition: Late of The American University Jeanne Ellis Ormrod, University of Northern Colorado (Emerita) 2001pg148
[12] *Ibid*

proceedings of international criminal court. Thus the researcher will utilize a descriptive approach analysis on proceedings of international criminal court. The descriptive approach may be considered as inductive[13] as conclusions are drawn from repeated observations that is letting facts speak for themselves.

1.6.1 Reliability of the instrument

Reliability is the measure of the degree to a research instrument yields consistent results after repeated trials. Reliability of the questionnaire, the researcher employed the methods of expert judgment and pretest in order to test and improve the reliability of the questionnaire.

1.6.2 Methods of data collection

Data are facts, figure and other relevant materials, past and present that serve as bases for the study and analysis[14]. He further states that data may be classified into primary and secondary sources. The researcher has obtained an introductory letter from the School of law of Kampala International University which she will present to the heads of legal institutions, heads of government ministries and authorities and ICC which will involve in the study. The researcher therefore will develop rapport, sought for consent and appointments with respective respondents to obtain the information.

1.7 Significance of the Study

The study will be beneficial to the law makers and those adjusting the principles and process of prosecuting and sentencing criminals in ICC and domestic courts allover the world.

1.8 Literature review

International cooperation and judicial assistance in criminal matters is the subject of Part IX of the Rome Statute establishing the International Criminal Court ("Rome Statute")[15]. This Part IX

[13] According to R. A. W. Rhodes, One-way, Two-way, or Dead-end Street: British Influence on the Study of Public Administration in America Since 1945, Public Administration Review, Pg44
[14] According to Krishnaswami, O.R. Methodology of Research in Social Sciences. Delhi:Himalaya (2002 Pg197).
[15] Rome Statute of the International Criminal Court UN Doc A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, available at http://www.un.org/law/icc/statute/romefra.htm [accessed 5 February 2010]

of the Rome Statute represents a novelty in its provisions concerning international cooperation and judicial assistance in criminal matters with respect to the obligations therein for States Parties. This is in marked contrast to the cooperation and judicial assistance in criminal matters before the International Criminal Tribunals for the former Yugoslavia and Rwanda ("ad hoc Tribunals") as well as inter-State cooperation on criminal matters.

The International Criminal Court ("Court") is not endowed with police or military forces authorised and empowered to apprehend suspects or to gather evidence. For these tasks, the Court depends, as the two *ad hoc* tribunals do, on the cooperation of existing national criminal justice systems[16]. The regime of cooperation of the *ad hoc* tribunals and the Court bears noteworthy distinctions defined by the manner in which these international institutions were established. This Chapter will reflect on the cooperation regime at the *ad hoc* Tribunals as well as the cooperation regime under the Rome Statute.

Crimes of atrocity have profound and long-lasting effects on any society. The difference between triggering and preventing these tragic crimes often amounts to the choice between national potential preserved or destroyed. It is also important to recognize that they are not inevitable: the commission of these crimes requires a collective effort, an organizational context and long planning and preparation. Thus, the idea of strengthening preventative action has taken on greater relevance, and is now encompassed in the emerging notion of 'responsibility to prevent'. International courts and tribunals contribute to this effort by ending impunity for past crimes. Focusing investigations and prosecution on the highest leadership maximizes the impact of this contribution.

The ICC has an additional preventative mandate which is fulfilled by its timely intervention in the form of preliminary examinations. Moreover, when atrocity crimes are triggered, its complementarity regime incentivises states to stop violence and comply with their duties to investigate and prosecute, thus strengthening the rule of law at the national level. the new role granted to victims by the Rome statute is key to the ICC's successful fulfillment of these functions. This new book of essays, which includes the author's unpublished inaugural lecture at

[16] A. Ciampi, The Obligation to Cooperate, in *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, edited by H.A.M. Von Hebel, J.G. Lammers and J. Schukking (1998) (OUP), 1607 -1638, at 1607-8

Utrecht University, examines these issues and places particular emphasis on the additional preventative mandate of the ICC, the ICC complementarity regime, the new role granted to victims and the prosecution of the highest leadership through the notion of indirect perpetration.

The interaction between domestic and international institutions in the investigation and prosecution of international crimes is one of the most dynamic developments in international criminal justice (International Criminal Court 2003; Burke-White 2008a; Kleffner 2008a; El Zeidy, 2008; Stahn and El Zeidy 2011; Nouwen 2013; ICTJ 2016). While early experiments in international criminal justice were traditionally centered on the exercise of international jurisdiction, there has been a trend in recent decades to relate investigation and prosecution of international crimes to a broader 'system of justice'[17], in which different levels of jurisdiction complement each other. This process is founded on the recognition in international treaty law and practice that certain crimes, including genocide, crimes against humanity, war crimes, and aggression, are so grave that they concern not only domestic societies but the international community as a whole. The system relies on interaction and cooperation between states, international institutional structures, civil society and local actors.

1.8.1 Domestic

National courts have traditionally been the main forum for justice. They are often the primary entry point for investigations and prosecutions, and ultimately the guardians of accountability in the long term. Recent studies acknowledge that the quality of national investigations and prosecutions is key for the success of international criminal justice (Bergsmo, Harlem and Hayashi 2010; ICTJ 2016). In past years, more and more states have adopted specialised laws or special prosecution units to investigate and prosecute international crimes (e.g., Guatemala, Colombia, Uganda), to accommodate specificities and complexities of norms and procedures relating to international crimes.

1.8.2 International

International institutions have been seen as a necessary complement to domestic jurisdiction in

[17] International Criminal Court 2013a, §22

specific circumstances. Their creation is particularly supported in contexts where domestic authorities were unable to try perpetrators due, for example, to security conditions, lack of legal or institutional capacity, or enforcement constraints, or not deemed sufficiently legitimate and independent to conduct trials and prosecutions.

1.8.3 Regional

The fourth, and as yet most underdeveloped model, is to turn to regional courts (Burke White 2003; Sirleaf 2016). Regional approaches present a number of advantages: a geographical proximity to crimes, and the ability to reflect specific regional interests or priorities. The most prominent example is the Malabo Protocol on the African Court of Justice and Human and Peoples' Rights (Ambos 2016). It combines jurisdiction over core crimes with certain transnational offences.

Regional human rights courts may influence domestic approaches towards investigation and prosecution of crimes. For instance, the Inter-American Court of Human Rights has monitored domestic prosecutions in over fifty cases and developed rich case law in relation to the right to truth, forced disappearances, amnesties and reparations. This type of human rights adjudication has been branded as 'quasi-criminal jurisdiction' (Huneeus 2013).

CHAPTER TWO

THE INTERNATIONAL CRIMINAL COURT PROCEEDINGS

2.1 Investigations (Articles 53 to 58)

2.1.1 The Role of the Prosecutor

Under the Rome Statute, the responsibility for investigations is given to the Prosecutor.[18] Although the triggering mechanisms for beginning an investigation are not part of Part V, they may affect the scope of certain investigations[19]. For example, under Article 13, a State Party or the United Nations Security Council may refer only a situation, not a specific case. However, when an investigation is triggered by an *ad hoc* referral from a non-member state, under Article 12(3), the referring state may limit its acceptance of the Court's jurisdiction to a specific case.

The self-referrals by the Democratic Republic of Congo and the Central African Republic were both made by way of letters referring the situation.[8] However, the self-referral from Uganda in December 2003, referred to "the situation concerning the Lord's Resistance Army."[20] The Prosecutor has indicated that the Ugandan referral "was interpreted in light of the principles of the *Rome Statute* as referring to crimes by any group in Northern Uganda."[21]

In any event, once an investigation is opened, the Prosecutor is obliged to "establish the truth" and to "investigate incriminating and exculpatory circumstances equally."[22] This creates an affirmative duty to both identify and disclose exculpatory evidence, and if the duty is faithfully carried out, will help to limit the extent to which prosecutions may become politicized. The

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

[19] Generally Hector Olasolo, The Triggering Procedure of the International Criminal Court (Leiden: Martinus Nijhoff, 2005).

[20] OTP, Press Release, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44 (29 January 2004).

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

[22] Rome Statute, supra note 1 at Article 54(1)(a) contains a duty to investigate "incriminating and exonerating circumstances equally."

balancing act which must be carried out by the Prosecutor in choosing situations to investigate and cases to prosecute is a challenging one.[23]

The Prosecutor has identified three essential principles which lie at the core of his strategy: (1) positive complementarity; (2) focused investigations and prosecutions; and (3) maximizing the impact of their work.[24] These criteria affect not only the selection of situations for investigation, but also the selection of cases for prosecution.

2.1.2 Selection of Situations for Investigation

When the Prosecutor receives a referral from a State Party or the Security Council, Article 53 provides that the Prosecutor shall initiate an investigation unless he determines that there is no reasonable basis to proceed.[25] If the Prosecutor decides against opening a full investigation of a referral, he must "promptly" inform the referring State in writing.[26] The decision to not investigate is subject to review by the Pre-Trial Chamber on its own motion or at the request of the State Party,[27] and victims have a right to present their views on the matter.[28] The duty to notify victims is laid upon the Court and not the Prosecutor, and it extends only to those who have been granted standing to participate and those who have already communicated with the

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

[24] ICC-OTP, Report on Prosecutorial Strategy (14 September 2006) at 4-6

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

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

[27] Rome Statute, supra note 1 at Article 53.

[28] ICC RPE, supra note 15 at Rule 92(2).

Court.[29]

The Prosecutor may also initiate an investigation *proprio motu* if he first concludes there is a reasonable basis to proceed and then seeks authorization to open a full investigation from the Pre-Trial Chamber.[30] When he submits such a request, he has a duty to notify "victims" so that they "may make representations to the Pre-Trial Chamber."[31] This is a broad duty which extends to "victims, known to [the Prosecutor] or to the Victims and Witnesses Unit, or their legal representatives." The rules allow the Prosecutor to "give notice by general means in order to reach groups of victims" and to seek the assistance of the Victims and Witnesses Unit (VWU) in efforts to provide notice.21 However, the Prosecutor has yet to submit such a request, instead pursuing a strategy of encouraging self-referrals by Member States. Thus he avoids both the duty to notify victims and the requirement that he seek approval for the investigation from the Pre-Trial Chamber.

The decision whether to open a formal investigation involves progressive levels of analysis of the referrals and communications received.[32] First, there is a preliminary analysis which begins with an initial, superficial review of the referring documents to determine whether the basic jurisdictional requirements are met, including sufficient gravity of the crimes, the interests of justice being met and the status of any complementary jurisdiction.[33] Then, a simple factual and legal analysis of the referral or communication is conducted based on the information supplied and other readily available public information. Finally, a third level of intensive analysis is completed prior to reaching a final decision on whether to open a formal investigation.[34]

As of March 2009, four investigations have been officially opened: the Democratic Republic of Congo,[35] Uganda,[36] Sudan[37] and most recently, the Central African Republic.[38] In meetings with

[29] *Ibid.* at Rule 92(2).
[30] Rome Statute, supra note 1 at Article 15. The last report from the Prosecutor on communications reveals that the Office has received over 7900 communications from more than 170 countries since July 2002.
[31] Rome Statute, ibid. at Article 15(3); ICC RPE, supra note 15 at Rule 50(1).
[32] ICC RPE, ibid. at Rule 50(1).
[33] *Ibid.* at 4. In February 2006, the Prosecution reported that a facial review of the communications received revealed that eighty percent of the communications failed to come within the Court's temporal or subject matter jurisdiction. "Update on communications received by the Prosecutor" (10 February 2006) at 1.
[34] ICC-OTP, "Draft Criteria", *supra note 10 at 4-5.*
[35] "The Office of the Prosecutor of the International Criminal Court opens its first investigation", ICC Press Release, ICC-OTP-20040623-59 (23 June 2004).

civil society held in February 2006, the Prosecutor reported that seven situations were being subjected to preliminary analysis and that ten situations had proceeded to the more intensive third phase of analysis. In March, he reported that Afghanistan, Colombia,[39] Cote d'Ivoire,[40] Georgia,[41] Kenya,[42] and the Palestinian Authority[43] were all being subjected to preliminary analysis.

In the early days, the fact that a State was being analyzed was not publicized, unless the matter was already widely known, or if there was a decision not to investigate, as with the decisions in relation to Iraq[44] and Venezuela.[45] More recently, a public approach has become the norm in hopes that by announcing that a situation is being monitored, crimes will be prevented and national prosecutions will be encouraged.[46]

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[36] "Prosecutor of the International Criminal Court opens an investigation into Northern Uganda", ICC Press Release, ICC-OTP-20040729-65 (27 July 2004).

[37] "The Prosecutor of the ICC opens investigation in Darfur", ICC Press Release, ICC-OTP-0606-104 (6 June 2005).

[38] "Prosecutor opens investigation in the Central African Republic", ICC Press Release, ICC-OTP- 20070522-220 (22 May 2007).

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

[40] OTP, Press Release ICC-20050215-91-En, "Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court" (15 February 2005).

[41] ICC-OTP, Press Release ICC-OTP-20080820-PR346 ENG, "ICC Prosecutor confirms situation in Georgia under analysis" (20 August 2008).

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

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

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

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

[46] Press Release, *No impunity for crimes committed in Georgia: OTP concludes second visit to Georgia in context of*

The Prosecutor may apply for an arrest warrant at any time after he begins an investigation. His application for an arrest warrant must convince the Pre-Trial Chamber that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."[47] When the Prosecutor applied for an arrest warrant for Bosco Ntanganda, who was allegedly involved in war crimes in the Democratic Republic of the Congo, Pre-Trial Chamber I denied the application, applying a three-part test to determine whether the allegations were sufficiently grave.[48] However, this decision was reversed by the Appeals Chamber in a decision which rejected the three-part test entirely. It held that any admissibility inquiry was improper in the context of an arrest warrant application unless a State Party or a suspect raised the issue as permitted under the Statute, or there were other special circumstances not existing in the Ntanganda application.[49]

Thus far, the Prosecutor has successfully applied for at least thirteen arrest warrants, four of which have now been executed.[50] The Prosecutor's request for an arrest warrant for President al-Bashir of Sudan was only partially granted by Pre-Trial Chamber I. The allegations of war crimes and crimes against humanity were found to be supported by enough evidence, but the decision on the arrest warrant was denied, with one judge dissenting, because the majority found

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preliminary examination, ICC-OTP-20100625-PR551 (25 June 2010).

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

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

[49] Judgement on the Prosecutor's appeal against the Decision of Pre-Trial Chamber I entitled Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-169, Situation in Democratic Republic of Congo (13 July 2006).

[50] Those currently in the custody of the ICC include Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, and Jean-Pierre Bemba Gombo.

the evidence insufficient to support allegations of specific intent to commit genocide.[51] The Prosecutor has requested leave to appeal the portion of the decision denying genocide as a basis for the arrest warrant.[52]

Once an arrest warrant is obtained, it must be executed. This is the Court's greatest legal limitation.[53] It is the job of the Prosecutor to secure the cooperation of the States Parties in executing arrest warrants.[54] Although States Parties have a duty to cooperate under Article 86 of the Statute,[55] there are no enforcement mechanisms in the Statute. The first person to appear before the Court had already been arrested in a different context when he was transferred to the Court on the basis of allegations involving the recruitment and use of child soldiers in combat activities.[56] The Prosecution has sometimes justified the selection of the Lubanga case because of the possibility of having a "high-impact" in the battle to stop the use of child soldiers,[57] but it may be that the real reason Lubanga is the first person to be tried at the ICC is the Court's lack of its own police powers, making the opportunity created by Mr. Lubanga's arrest in a different context a determining factor.[58] Although the arrest warrants for Joseph Kony and the other Lord's Resistance Army rebels were listed on Interpol's Red Notice list since 1 June 2006, they have not yet been arrested.[59] Likewise, the arrest or surrender of the President of Sudan does not

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

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

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

[54] Dov Jacobs, supra note 12 at 334, where the author notes "the success of the ICC will depend on the capacity of the OTP to obtain the cooperation of the State parties, especially those where the crimes have been committed."

[55] Rome Statute, supra note 1 at Articles 86 and 89, which provide a general obligation of cooperation and impose an obligation for states to arrest

[56] Warrant of arrest, ICC-01/04-01/06-2-tEN, Lubanga, (10 February 2006, published on 3 April 2006 pursuant to decision ICC-01/04-01/06-37).

[57] Office of the Prosecutor, Report on Prosecutorial Strategy (14 September 2006) at 4.

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

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

appear likely in the near future.

2.1.3 The Role of the Pre-Trial Chamber during an Investigation

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

2.1.3.1 Unique investigative opportunities and the appointment of Ad Hoc Defence Counsel

The Pre-Trial Chamber has the power to take steps to preserve the rights of the Defence in two ways. Firstly, it may act when unique investigative opportunities arise.[60] For example, when forensic issues arose in connection with an investigation in the Democratic Republic of Congo, the Pre-Trial Chamber responded by appointing an ad hoc Defence Counsel.[61]

The Pre-Trial Chamber may also appoint ad hoc Defence counsel to represent the general interests of the Defence. Ad hoc Defence counsels have been appointed to respond to amicus curiae observations.[62] Defence counsels have also be appointed to respond to applications from individuals wishing to participate as victims in the proceedings. This role comes despite the fact that the Office of Public Counsel for the Defence already plays a role in the processing of applications from individuals wishing to be recognised as victims.[63] An ad hoc Defence Counsel's mandate is strictly limited by the language used in the decision assigning counsel. Unless expressly included in the mandate, challenges to jurisdiction are outside the scope of an ad hoc Defence counsel's remit.[64]

2.1.3.2 Supervising the participation of victims

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

[61] Decision to Hold Consultation under Rule 114, ICC-01/04-19, Situation in the Democratic Republic of Congo, Pre-Trial Chamber I (21 April 2005).

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

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

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

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

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

Victims who are granted standing to participate must seek further authorisation from the Pre-Trial Chamber in order to establish the modalities of their participation.[65] Under Rule 93, a Chamber is authorised to "seek the views of victims or their legal representatives [participating in proceedings] on any issue, including," decisions by the Prosecutor not to investigate a situation referred by a State Party or the UN Security Council.[66] However, the Pre-Trial Chamber has discretion to decide whether to allow participation by victims. For example, in the situation of the Central African Republic, no victim participation has been permitted to date.

2.1.3.3 Supervising Prosecutorial Discretion

Despite its minor role during the investigation, the Pre-Trial Chamber plays an important supervisory role over Prosecutorial discretion.[67] This role is most clearly illustrated in the two ways already mentioned reviewing participation applications by victim, and establishing the modalities of their participation. Additionally, if the Prosecutor wishes to open an investigation on his own initiative under Article 15, he must first seek leave of the Pre-Trial Chamber. The Pre-Trial Chamber is also responsible for determining if there is sufficient evidence to support an

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

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

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

arrest warrant or a summons to appear under Article 58.[68] Further, it may request additional information before granting an arrest warrant.[69] There has been only one instance where an application for such a warrant was denied in full, and that decision was reversed on appeal.[70] Upon remand, the arrest warrant was issued.[71] The Prosecutor has requested leave to appeal the Pre-Trial Chamber's denial of his request for a single genocide charge in the arrest warrant for Omar al–Bashir, the President of Sudan.[72] At the time of writing, the request for leave to appeal has been pending for 90 days.

Court Regulation 48 provides that the Pre-Trial Chamber may request specific or additional information if it considers it necessary in order to exercise its functions and responsibilities set forth in Article 53(3)(b) (review of decision not to investigate in the interests of justice), Article 56(3)(a) (unique investigative opportunities) and Article 57(3)(c) (witness protection). The Pre-Trial Chamber asserted its supervisory powers by requesting an update from the Prosecutor in the preliminary evaluation of the Situation in the Central African Republic (CAR). The Prosecutor had received a referral from the Government of the CAR on 22 December 2004; and then almost two years passed without any action from the Prosecutor.65 The Pre-Trial Chamber eventually issued a decision noting that the Prosecution had failed to notify promptly the Government of the CAR and requesting a report from the Prosecutor containing information on the current status of the preliminary examination This report was to include a tentative schedule of when it would be concluded and when a decision would be made regarding whether to pursue an investigation or not.[73]

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

[69] Decision requesting additional information and supporting materials, ICC-02/05-166, Situation in Darfur, Sudan (9 December 2008); Décision demandant des éléments justificatifs

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

[71] Warrant of arrest, ICC-01/04-02/06-2-US, Ntaganda, Pre-Trial Chamber I (24 August 2006, reclassified as public on 28 April 2008).

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

[73] Decision Requesting Information on the Status of the Preliminary Examination of the Situation of the Central

The Prosecutor responded by filing a report for purposes of "transparency." However, his report cautioned that no decision had yet been taken, that the Statute imposed no time limit for doing so, and that until a decision was taken, there was no duty to report promptly.[74] The Prosecutor asserted that by filing the report, he was "neither accepting the existence of a legal obligation to submit this type of information absent any decision under Article 53 being made, nor adopting a precedent that it may follow in future cases."[75] Moreover, he "expressly reserve[d]" his position on "the proper scope of the legal provisions cited by the Chamber in its 30 November 2006 Decision, the division of competences between the OTP and Pre- Trial Chambers, and the rights of States who have referred Situations to the Court."[76]

The first arrest warrant in the CAR Situation was issued on 23 May 2008.[77]

2.1.4 Prosecution (Articles 59 to 61)

The second half of Part V deals with "prosecution", or more accurately, with "charging." The process of charging a person begins with that person's initial appearance before the Pre-Trial Chamber[78] and continues until there is a decision on the confirmation of charges.[79] After, the case is transferred to a Trial Chamber where a plea is entered for the first time and a genuine pre-trial phase begins.[80]

Beginning with the initial appearance, the Pre-Trial Chamber becomes more active. In their own estimation, they become a central force for discovering the truth.[81] Under Article 61(3) and applicable rules and regulations, the Pre-Trial Chamber oversees preparations for the confirmation of charges hearing, including the Prosecution's delivery of the charging document

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African Republic, ICC-01/05-6, Pre-Trial Chamber III, (30 November 2006).
[74] Prosecution's Report, supra note 65 at para. 11.
[75] *Ibid*
[76] Ibid
[77] Mandat d'arrêt à l'encontre de Jean-Pierre Bemba Gombo, ICC-01/05-01/08-1, Bemba, Pre-Trial Chamber III (23 May 2008)
[78] *Rome Statute*, *supra* note 1 at Article 60 (Initial proceedings before the Court).
[79] Rome Statute, ibid. Article 61 (confirmation of the charges before Trial) is the final Article in Part V of the Statute. Under Article 60(11), once charges are confirmed, the Presidency of the Court is responsible for constituting a Trial Chamber which is responsible for subsequent proceedings
[80] Rome Statute, ibid. at Part VI – The Trial (Articles 62 to 76). Article 64(8)(a) provides for the entry of a plea of guilty or not guilty
[81] Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, Pre-Trial Chamber III, Bemba, 31 July 2008, paras. 5, 8-11.

and disclosure of evidence to be relied upon at the hearing.[82] The Pre-Trial Chamber also conducts periodic review of the release or detention of the arrested person.[83]

The Charging Document

A person brought before the ICC is not notified of the charges against him until a date set by the Pre-Trial Chamber, which need only be "a reasonable time before the [confirmation of charges] hearing." The date for the hearing must be set by the Pre-Trial Chamber at the initial appearance,[84] and the charges must be filed at least 30 days prior to that hearing.[85] In Lubanga, the Prosecution served the charges five months after the initial appearance. Katanga waited a little over three months. Bemba waited three months, although seven months after those charges were delivered, the Prosecution was required to change the legal basis for the charges.[86]

In the case of Bahr Idriss Abu Garda, who appeared in response to a summons on 18 May 2009, the confirmation of charges hearing was held 19–29 October 2009.[87] Therefore the Prosecutor had four months (until 19 September 2009) within which to disclose the charges and the evidence supporting the charges.

The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Rome Statute provisions on charging are quite similar.81 There is also an abundance of ad hoc

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

[83] Rome Statute, supra note 1 at Article 60(3).

[84] *Ibid.* at Article 61(3)(a) and *ICC RPE*, *supra* note 15, Rule 121(3).

[85] *ICC RPE*, *supra* note 15, Rule 121(3).

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

[87] The *Prosecutor v. Bahar Idriss Abu Garda*, Transcript of initial appearance, ICC-02/05-02/09-T-4, at 8-9 (18 May 2009).

Tribunal jurisprudence on charging practices.[88] Yet, the ICC has become an area of unpredictable and contradictory jurisprudence when it comes to challenging the form of the charges.

In Lubanga, the decision on a motion challenging the failure to allege with specificity the mode of participation was included as part of the decision on the confirmation of charges.[89] Pre-Trial Chamber I ruled that "the Prosecution is under no obligation to articulate in the Document Containing the Charges its legal understanding of the various modes of liability and the alleged crimes."[90] Details of the charges are to be divined from the charging document along with the evidence in the list of exhibits to be relied upon at the confirmation hearing.[91] The Lubanga Pre-Trial Chamber seemed to indicate it did not consider itself to have the power to require greater specificity from the Prosecutor.[92] These rulings effectively jettisoned the law on indictments developed at the ad hoc Tribunals.[93]

In Katanga and Ngudjolo, the Pre-Trial Chamber granted two Defence requests to strike language from the charges.[94] The catch-all phrase "but are not limited to" was struck because it lacked a factual basis in the evidence, and surplus language was also struck, consisting of statements taken from a contested interview of Mr. Katanga.[95] The Pre-Trial Chamber ordered that the language be removed because it referred only to evidence which the Defence adamantly denied and did not refer to material facts or their legal characterization.[96]

The Katanga Pre-Trial Chamber issued its decision on the challenges to the form of the

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[88] Helen B. Klann, "Vagueness of Indictment: Rules to safeguard the rights of the accused" in Emmanuel Decaux, Adama Dieng & Malick Sow, eds., From Human Rights to International Law/ Des droits de l'homme au droit international pénal, (Dordrecht, the Netherlands: Martinus Nijhoff Publishers, 2007) at 109.
[89] Decision on the confirmation of charges, ICC-01/04-01/06-803, Lubanga, Pre-Trial Chamber I, (29 January 2007) at para. 146-153.
[90] *Ibid*
[91] *Ibid*
[92] See Decision on confirmation of charges, in Lubanga at para. 150-53. Rather than requiring greater specificity in the pleading, Pre-Trial Chamber I stated that it "can only regret that the Prosecution did not see fit to plead with greater specificity the context in which the crimes" occurred.
[93] Helen B. Klann, supra note 82 at 109-124.
[94] Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, ICC-01/04-01/07-648, Katanga and Ngudjulo, Pre-Trial Chamber I (25 June 2008).
[95] *Ibid*
[96] *Ibid*

indictment shortly before the start of the hearing on the confirmation of charges.[97] It announced that "in the event that the charges are confirmed, nothing in the Statute and the Rules prevents the filing in the pre-trial proceedings before the Trial Chamber of an amended Charging Document in which the underlined facts and their legal characterisation are adjusted in light of the Pre-Trial Chamber's decision confirming the charges."[98] However, six months earlier, Trial Chamber I had held the opposite when it ruled that "any application to amend the charges must be made to the Pre-Trial Chamber."[99]

In Bemba, Pre-Trial Chamber III issued a Request for Clarification on Document Containing the Charges,[100] seeking clarification as to whether the conflict underlying the charges was international or non-international. Then, following the hearing on the confirmation of charges, Pre-Trial Chamber III issued a Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute,[101] which held that each mode of responsibility constituted a separate crime, and that defendants were in fairness entitled to notice of the crime with which they are charged.[102] The Pre-Trial Chamber gave the Prosecution an opportunity to amend the charges to conform with the evidence and requested briefings on the new charges and command responsibility. The amended charges now include allegations of command responsibility.

2.2 Disclosure of Evidence

Evidence Supporting Arrest Warrants

There are three discrete sets of disclosure which must be completed before the Pre-Trial Chamber: (1) the evidence relied upon in support of the arrest warrant; (2) the evidence relied upon in support of the charges, which must be disclosed at least 30 days before the hearing on confirmation of charges;[103] and (3) exculpatory evidence. In addition, Pre-Trial Chamber II has

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[97] *Ibid*
[98] *Ibid*
[99] Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, Lubanga, Trial Chamber I (13 December 2007) at para. 40.
[100] ICC-01/05-01/08-207 (4 November 2008).
[101] ICC-01/05-01/08-388 (3 March 2009).
[102] Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, ICC-01/05- 01/08-388, Bemba (3 March 2009) at para. 26-28
[103] ICC RPE, supra note 15 at Rule 121(3).

also required that all materials provided to the Defence by the Prosecution should be communicated to the Registry for inclusion in the case dossier.[104]

Disclosure of the evidence supporting the arrest warrant is necessary if an accused person is to able to seek provisional release under Article 60(2), which provides that unless the conditions for an arrest warrant set out in Article 58(1) continue to be met, the Pre-Trial Chamber shall release the person named in the warrant, with or without conditions. Article 58(1) requires, *inter alia,* that "[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."[105]

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

> To allow this to take place, the Appeals Chamber considers that the Prosecutor should have this in mind when submitting an application for a warrant of arrest under Article 58 of the Statute and should, as soon as possible, and preferably at that time, alert the Pre-Trial Chamber as to any redactions that he considers might be necessary.
>
> The nature and timing of such disclosure must take into account the context in which the Court operates. The right to disclosure in these circumstances must be assessed by reference to the need, inter alia, to ensure that victims and witnesses are appropriately protected (see Article 68 (1) of the Statute and Rule 81 of the Rules).[106]

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

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

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

Exculpatory Evidence

The Pre-Trial Chamber's supervisory role in relation to the disclosure of exculpatory evidence is illustrated by the litigation which arose in connection with the Prosecutor's use of confidentiality agreements under Article 54(3)(e). Article 54(3)(e) allows the Prosecutor to "[a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents." In the Lubanga case, he used these agreements to gain wholesale access to evidence which was not intended to generate new evidence, but was expected to be used as evidence at trial, and which in some instances contained exculpatory evidence.[107] Rule 67(2) requires disclosure of exculpatory evidence, and provides for judicial review "in case of doubt" as to whether there should be disclosure.

Although most prominently played out in the Trial Chamber, the struggle between the Prosecutor and the Pre-Trial Chamber formed the backdrop leading to the imposition of a indefinite stay of the trial proceedings in Lubanga.[108] In his appeal of the indefinite stay, the Prosecutor submitted that he had already furnished the Chamber with "adequate information" and that the Chamber should "refrain from interfering with the manner in which the Prosecution is discharging its disclosure duties,"[109] and criticized the Trial Chamber "for declining an offer to 'confer' with an information-provider."[110]

Scheffer envisioned such problems would arise, noting that the "regular eruption" of "miscarriages of justice" arising from the non-disclosure of exculpatory evidence in national

[107] Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401, Lubanga, Trial Chamber I (13 June 2008) at para. 12.
[108] Ibid. This issue had already arisen in the Pre-Trial Chamber, and not only in Lubanga. See, e.g., Decision on the Prosecutor's Application that the Pre-Trial Chamber disregard as irrelevant the Submission filed by the Registry on 5 December 2005, ICC-02/04-01/05-147, Situation in Uganda, Pre-Trial Chamber II (8 March 2006). The Chamber held, "Article 54, paragraph 3(f) of the Statute cannot be invoked by the Prosecutor to preclude information from coming before a Chamber. This provision does not grant the Prosecutor an absolute right to confidentiality, especially towards the judges or the Chambers, but simply an entitlement 'to ensure the confidentiality of information', which the Chamber itself may also ensure."
[109] Decision on consequences of non-disclosure, ICC-01704-01/06, Lubanga (13 June 2006) at para. 14.
[110] Prosecution's Application for Leave to Appeal Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the Application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1407 Lubanga, Trial Chamber I (23 June 2008) at para. 15

systems "suggests that it is an issue that should remain in the forefront of serious examination by the ICC judges, particularly in the Court's early years of litigation."[111] His theory that "[t]he front line is the Pre-Trial Chamber" does not yet hold true at the ICC.[112] Pre-Trial Chamber I confirmed the charges in Lubanga, leaving it to the Trial Chamber to sort out the Prosecutor's misuse of the confidentiality agreements. In future, the Pre-Trial Chambers should more closely examine what consequences might apply if exculpatory evidence is being withheld prior to the confirmation of charges.

2.3 Substantial evidence to support the charges

The disclosure of evidence to be relied upon at the confirmation of charges hearing involves a complex system where each item disclosed or inspected is placed into the case dossier, such that the Pre-Trial Chamber may conduct its own analysis of all the evidence.[113] The decision setting out the disclosure process has been described as reflecting "the instincts of an activist judge willing to dig deep into the investigative procedures and direct the parties as to how the evidence will be managed in the future rather than await their performance and judge accordingly."[114]

A Judge on the Yugoslav Tribunal, who was also a former Defence Counsel coming from a continental legal system, noted that [a]lthough disclosure is an inherent aspect of common-law modelled criminal procedures, it has lost a bit of its character in the ICC. The communication of all the disclosed material and information with the Trial Chamber alters the character of the disclosure. It has approached in its effects the creation of a dossier.[115]

However, this dossier is different than one might encounter in a continental legal system. Under the decisions of the Pre-Trial Chambers, the Prosecutor is strategically allowed to withhold relevant evidence which he intends to use at trial, so long as he does not need it to meet the

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[111] Scheffer, supra note 59 at 151, 152.
[112] *Ibid*
[113] Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06- 102, Lubanga, Pre-Trial Chamber I (15 May 2006) at 5-6.
[114] Scheffer, supra note 59 at 159, referring to Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06-102, Lubanga, Pre-Trial Chamber I (15 May 2006).
[115] Alphons Orie, "Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC" in Antonio Cassese, supra note 38 at 1484.

"substantial grounds" threshold necessary to confirm the charges.[116] This is similar to what occurs in some common law systems, except that the "substantial grounds" threshold imposes a heavier burden than the "probable cause" or "prima facie evidence" standard.[117] Evidence is strategically withheld in order to protect witnesses or otherwise gain an advantage at trial.

2.4 Participation of Victims

The Court must notify "victims or their legal representatives who have already participated in the proceedings or, as far as possible, those who have communicated with the Court in respect of the case in question," of the decision to hold a confirmation of charges hearing.[118] In order to participate in such hearings, victims must submit a written application and receive authorisation from the relevant Chamber.[119]

Pre-Trial Chamber I has limited the appointments of ad hoc counsel to the investigative phase so that adversarial positions may be taken in response to applications from individuals wishing to be recognised as victims in order to participate in the proceedings. Pre-Trial Chamber II has appointed ad hoc Counsel to represent the Defence in the absence of the persons sought by the Court.[120] Appeals by ad hoc Counsel raising conflict of interest arguments are currently pending before the Court.[121] Assignment of ad hoc Counsel appears to be required whenever a Pre- Trial Chamber decides to address the question of admissibility on its own initiative.[122]

Rule 91 governs the participation of victims in the proceedings. It provides that legal

[116] Rome Statute, supra note 1 at Article 61(7). Additionally, Article 67(2) stipulates that exculpatory evidence must be disclosed as soon as practicable. See also Article 64(3)(c),"Functions and powers of the Trial Chamber", and ICC RPE, supra note 15 at Rule 84 on "Disclosure and additional evidence for trial". See also Kai Ambos and Dennis Miller, "Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective" (2007) 7 Int'l Crim. L. R. 335 at 343.
[117] Gauthier de Beco, *supra* note 75 at 475-6.
[118] ICC RPE, supra note 15 at Rule 92(3).
[119] Decision on the Applications for Participation in the Proceedings of a /0001/06, a/0002/06 and a/0003/06, ICC-01/04-01/06, Lubanga and Situation in the Democratic Republic of the Congo (28 July 2006); Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans Lubanga, ICC-01/04-01/06-601, Lubanga (20 October 2006) (available only in French).
[120] Decision on the admissibility of the case under Article 19(1) of the Statute, ICC-02/04-01/05-377, Kony et als. (10 March 2009) at para. 32.
[121] Defence Appeal against Decision on the admissibility of the case under Article 19 (1) of the Statute ICC-02/04-01/05-379, Kony et als., (16 March 2009).
[122] Judgement on the Prosecutor's appeal against the decision of Pre-Trial Chamber I in Decision on Prosecutor's application for Warrants of Arrest, Article 58, ICC-01/04-169-US-Exp, Situation in the Democratic Republic of Congo (13 July 2006, reclassified as public on 23 September 2008).

representatives of victims who have been granted standing to participate are "entitled" to attend and participate in the proceedings, including hearings, "unless the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions."

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

> *Rule 125 : decisions to hold a hearing on the confirmation of charges in the absence of the person concerned;*
>
> *Rule 128 : amendment of the charges; Rule 136 : joint and separate trials;*
>
> *Rule 139 : decision on admission of guilt; and*
>
> *Rule 191 : assurances provided by the Court for witnesses and experts under Article 93(2).*

In addition, Article 19(3) provides that victims may submit observations on questions of jurisdiction and admissibility of a case; Article 13(2) provides that victims shall be allowed to consult the court record. This has been held to include non-public documents.[123]

2.5 The Confirmation of Charges Hearing

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

Pre-Trial Chamber I

In Lubanga, a Single Judge of Pre-Trial Chamber I issued a decision setting out the disclosure processes for preparing for the confirmation hearing.[124] Dates were set for disclosure of the

[123] Decision on the Applications for Participation in the Proceedings of VPRS 1 – 6, ICC-01/04-101, Situation in the Democratic Republic of Congo (17 January 2006) at para. 76.
[124] Decision On The Final System Of Disclosure And The Establishment Of A Timetable, ICC-01/04- 01/06-102,

evidence upon which the parties intended to rely at the hearing. The case dossier was limited to the evidence selected by the parties:-

> In the opinion of the single judge, it is not the role of the Pre-Trial Chamber to find the truth concerning the guilt or innocence of Thomas Lubanga Dyilo, but to determine whether sufficient evidence exists to establish substantial grounds to believe that he is criminally liable for the crimes alleged by the Prosecution. The single judge considers that it would be contrary to the role of the Pre-Trial Chamber to file in the record of the case and present at the confirmation hearing potentially exculpatory and other materials disclosed by the Prosecution before the hearing, if neither party intends to rely on those materials at that hearing.[125]

At the hearing, the evidence included on the Prosecution and Defence lists of evidence was automatically "admitted into evidence for the purpose of the confirmation hearing" unless the Pre-Trial Chamber expressly ruled the evidence inadmissible "upon a challenge by any of the participants at the hearing."[126] It defined the Prosecution's evidentiary burden as follows:

> [T]he Prosecution [...] must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations. Furthermore, the 'substantial grounds to believe' standard must enable all the evidence admitted for the purpose of the confirmation hearing to be assessed as a whole. After an exacting scrutiny of all the evidence, the Chamber will determine whether it is thoroughly satisfied that the Prosecutor's allegations are sufficiently strong to commit [the case] to trial.[127]

Responsive post-hearing briefs were allowed in both Lubanga and Katanga.[128]

Lubanga, Pre-Trial Chamber I (16 May 2006).

[125] Ibid

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

[127] Decision on the confirmation of charges, ICC-01/04-01/06-803, Lubanga (29 January 2007).

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

Lubanga; The first confirmation of charges hearing to be held was in Lubanga. The hearing spanned 13 days over a three week period.[129] They featured two Counsel representing groups of victims, and one Defence Counsel. Three full days were spent on opening statements and closing arguments. The Prosecution's presentation of documentary and video evidence took two days, and was followed by a Prosecution witness who was examined and cross-examined over three days of testimony. One question was put to the witness by the judge on behalf of a victims' representative. This was followed by four days of procedural matters and Defence arguments. When the Defence objected to a racial label used by the Prosecution, the Pre-Trial Chamber requested and was provided with additional evidence on the issue from the Prosecution. The hearing ended with a full day of closing arguments by the Prosecution, victims' representatives and the Defence.

Katanga and Ngudjolo; The Katanga and Ngudjolo hearing was slightly shorter in the total number of hours, but it was scheduled during eleven half-days over a three week period.[130] The number of counsels involved was much greater. The proceedings included four teams of Counsel representing groups of victims, as well as the team of lawyers for the Prosecution and Defence Counsel for Katanga and for Ngudjolo. A total of four half-days were filled with opening statements and closing arguments by prosecution, victims representatives and both Defence teams. Two half-days were filled with procedural matters, including one day spent addressing the waiver of Katanga's right to be present at the hearing. The Prosecution presented its evidence over two half- days, the victims argued about the evidence during one half-day, and the Katanga and Ngudjolo Defence teams took one half-day each to present their arguments and evidence against confirmation.

There were no live witnesses. Prior to the hearing, a Defence Counsel suggested that confirmation of charges might be conducted in writing, with only a short hearing.[131] This suggestion was ignored, as the three-week-long schedule was adhered to.

(28 July 2008).

[129] Hearing Transcripts, ICC-01/04-01/06-T-30 to ICC-01/04-01/06-T-47, Lubanga (9 to 28 November 2006).

[130] Hearing Transcripts, ICC-01/04-01/07-T-38 to ICC-01/04-01/07-T-50, Katanga and Ngudjolo, (27 June to 16 July 2008).

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

PRE-TRIAL CHAMBER III

The approach of Pre-Trial Chamber III has been very different from that adopted by Pre-Trial Chamber I. Pre-Trial Chamber III regards its role as central to the truth seeking process. Therefore, the Chamber needs "access to the evidence exchanged between the Prosecutor and the Defence, in particular to exculpatory evidence."[132] Even more, Pre-Trial Chamber III includes in the case dossier all materials disclosed under RPE 77. Rule 77 governs the "Inspection of material in possession or control of the Prosecutor," and permits the Defence to inspect materials in the possession of the Prosecution which are "material to the preparation of the defence."[133] Therefore, under the regime imposed in Pre-Trial Chamber III, any evidence inspected by the Defence in the Prosecution archives is automatically communicated to the Chamber and becomes part of the case dossier.[134]

Bemba

The hearing in Bemba involved eight counts of war crimes and crimes against humanity and it lasted four days.[135] Opening statements and closing arguments took less than one day. No witnesses were called by either side. The parties were required to follow a strict outline of the legal issues, with the floor passing between the parties at each issue, rather than requiring (or allowing) the Prosecution to present its full case before requiring the Defence to respond.

On the initial day of the hearing, Pre-Trial Chamber III announced for the first time that "because the hearing itself is oral, the Chamber would like to ask the parties and other participants to present their requests or motions orally. Only in exceptional circumstances and with the authorization of the Bench may the participants file written requests or motions. Upon such a request or motion, the Chamber will either discuss the matter from the Bench with the microphones cut off and immediately issue a decision, or the Chamber will deliberate the matter outside the courtroom and issue a decision at a later time."[136] The Defence had announced at

[132] Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, Pre-Trial Chamber III, Bemba, (31 July 2008) at para. 16-19.
[133] Ibid. at para. 49
[134] *Ibid*
[135] Hearing Transcripts, ICC-01/05-01/08-T-9 to ICC-01/05-01/08-T-12, Bemba, (12 to 15 January 2009).
[136] Hearing Transcripts, ICC-01/05-01/08-T-9, Bemba, (12 January 2009) at 8

status conferences that it intended to rely on a post-hearing brief, so objections were made and a twenty-five page brief was permitted.[137] Pre-Trial Chamber III closed the hearing by assuring the parties that if they had omitted addressing any of the evidence which had been disclosed by the prosecution, they need not worry because the Chamber would be independently examining all of the evidence, exculpatory and inculpatory, in reaching its decision on whether or not to confirm charges.[138]

2.6 Decision on the Confirmation of Charges

Following the hearing, the Pre-Trial Chamber must determine whether there is sufficient evidence to establish "substantial grounds" to believe that the person committed each of the crimes charged.[139] The Pre-Trial Chamber has several options:

(1) it may confirm the charges, (2) deny confirmation of the charges on the basis of insufficient evidence, or (3) it may adjourn the hearing either to request the Prosecutor to consider presenting additional evidence, or to request the Prosecutor to consider amending the charges in order to conform them to the evidence.[140]

The decision on the confirmation of charges must be delivered by the Pre- Trial Chamber within sixty days of the conclusion of the hearing.[141] In Lubanga, the decision was 157 pages long.[142] It has been the subject of numerous scholarly articles in law reviews138 and has been criticized, inter alia,[143] for its definition of "substantial grounds to believe"[144] and for failing to keep in

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[137] *Ibid*
[138] Hearing Transcripts, ICC-01/05-01/08-T-12, Bemba, (15 January 2009) at 141.
[139] Rome Statute, supra note 1 at Article 61(7).
[140] *Ibid*
[141] International Criminal Court Regulation 53 (entitled "Decision of the Pre-Trial Chamber following the confirmation hearing").
[142] Decision on the confirmation of Charges, ICC-01/04-01/06, Lubanga (29 January 2007); Decision on the confirmation of charges, ICC-01/04-01/07-717, Katanga and Ngudjolo, (1 October 2008).
[143] Other criticisms relate to: (1) the Pre-Trial Chamber's interpretation of "protracted armed conflict" in relation to armed groups and (2) questions concerning the Pre-Trial Chambers analysis of whether use as a body guard is enough to qualify as participating actively in hostilities – see Juan Ochoa, ibid. at 44-46; (3) whether enunciated standards on co-perpetration were correctly applied – see Thomas Weigand, "Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges", (2008) 6 J. Int'l Criminal Justice 471-487 . See also Michela Miraglia, "Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga", (2008) 6 J. Int'l Criminal Justice 489-503, noting that a number of procedural aspects of the decision will further judicial interpretation to become less contentious.
[144] Decision on Confirmation of charges, Lubanga, para. 38-39; Gauthier de Beco, supra note 75 at 474-5 and notes

mind the summary nature of the confirmation of charges proceedings:

It can even be said that Pre-Trial Chamber I by examining the history of the war in Ituri as well as numerous official reports and witness statements, as can be seen from its Decision to confirm the charges, largely exceeded the threshold required to confirm the charges brought by the Prosecutor. As a result, it somewhat contributed to the feeling that Thomas Lubanga Dyilo is already guilty. Doing so might have undermined his right to the presumption of innocence protected by Article 66(1).[145]

In Katanga, the Decision on confirmation of charges is 213 pages long.[146] Unlike in Lubanga, articles criticizing Katanga have not yet been published at the time of writing. However, Judge Anita Usacka appended a partly dissenting twelve- page opinion to the Decision, where she wrote that she was not "thoroughly satisfied" that "the Prosecution's allegations were sufficiently strong to establish substantial grounds to believe that the suspects were criminally responsible for the commission of rape and sexual slavery to be committed during the attack on Bogoro village, or even in the aftermath of the Bogoro attack, or to establish the suspects' knowledge that rape and sexual slavery would be committed by the combatants in the ordinary course of events."[147] She suggested that the proceedings should have been adjourned to allow the Prosecutor to amend the charges.[148]

Bemba was ultimately charged with two counts of crimes against humanity, and three counts of war crimes.[149]

2.7 The position of the "Charged Person"

Rule 121 provides that the rights of an accused person under Article 67 apply to a charged

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19 and 20, where he stipulates that "First, the terms 'serious reasons to believe' or 'strong grounds for believing' were not used by the European Court of Human Rights to determine the terms 'substantial grounds to believe'. Second, these standards have been applied in a totally different context, namely in the so-called 'death row phenomenon' under Article 3 of the European Convention of Human Rights."

[145] Gauthier de Beco, supra note 75 at 476

[146] Decision on the confirmation of charges, ICC-01/04-01/07-717, Katanga and Ngudjolo, Pre-Trial Chamber I, (1 October 2008).

[147] *Ibid*

[148] *Ibid*

[149] Decision on the confirmation of charges, ICC-01/05-01/08, Bemba, (15 June 2009).

person preparing for a confirmation of charges hearing.[150] However, the ICC's legal aid system is designed to deny all but the most basic legal assistance until after charges have been confirmed.[151] A close examination of the travaux preparatoire leading to the adoption of the legal aid system shows that no one anticipated that victims participate in the proceedings before the Pre-Trial Chamber. No consideration was given to the Defence labour required to address issues relating to victims participation. The Registry has just issued a report to the Assembly of States Parties to the Rome Statute, which states:

In the cases of Lubanga and Katanga et al., the total number of filings in each case is 1,431 documents (of which 415 are public) and 683 (of which 233 are public) respectively. Such a rate averages some 2.5 filings per day and, when submitted by parties or participants other than the Defence, all must be considered carefully by the Defence itself. These documents are in addition to the countless ones disclosed by the Prosecutor to the Defence and which are not in the case file.[152]

The prosecution has dozens of attorneys sharing the workload leading up to a confirmation hearing,[153] while generally a single Defence Counsel (albeit with a legal assistant and a case manager) faces hundreds of deadlines involving complex and difficult issues. The number of motions and decisions, the shortness of filing deadlines (for example, 5 days to seek leave to appeal decisions which may be hundreds of pages long), combined with the fact that the

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

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

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

[153] "Proposed Programme Budget for 2007 of the International Criminal Court", ICC-ASP/5/9, (22 August 2006) at 20. The Court's proposed budget program for 2007 includes a diagram of the Prosecutor's Office showing there are divisions headed by deputy prosecutors for investigations and for prosecutions, with a service section which includes translation services.

computation of time includes weekends and holidays regardless of how short the deadline, creates a particularly difficult burden upon a single Defence Counsel. Additionally, Defence Counsel must grapple with court decisions in French or English and no translation services provided before time expires on seeking leave to appeal. The Pre-Trial Chamber in Katanga adopted the Registry practice of requiring designated Counsel to agree, prior to appointment as permanent counsel, that no English or French translation services will be required to assist in the review evidence and communicate with the client.[154]

The result of this process is that indigent detainees are consistently held for months without being notified of the charges against them or the evidence to be used against them. Mr. Katanga did not attend much of the hearing on the confirmation of his charges, waiving his right to be present and basing his decision on low morale due to not having seen his wife since he was arrested in 2005.[155] He has since won an appeal of a Registry decision limiting legal assistance for family visits.[156]

Moreover, attorneys for accused persons are not provided with adequate facilities to prepare a Defence.[157] As one Defence Counsel noted during his closing argument at the Katanga and Ngudjolo Confirmation of charges hearing:

It's been a rather strange, in fact sometimes awkward situation sitting here, confronted by -- we're uncertain of the numbers. We think it's either 12 or 13 of our learned colleagues in this confrontationally designed courtroom where we face one another in this way rather than the Bench to whom, of course, we should address. The numbers alone give us gravest doubts as to the essential systemic fairness of this system.[158]

The hearings in Lubanga and Katanga involved weeks of opening statements and closing arguments and discussions of evidence from the parties and participating victims, all of which

[154] Status Conference transcript ICC-01/04-01/07-T11-FRA, Katanga and Ngudjolo, (14 December 2007) at 4-9.
[155] Confirmation of Hearing Charges Transcript, ICC-01/04-01/07-T-45, Katanga and Ngudjolo (9 July 2008) at 2. The Registry is currently conducting consultations on the need for legal aid to support family visits. The Assembly of States Parties has exhibited resistance to funding such visits.
[156] ICC-RoR217-02/08-8-Conf-Exp, Ngudjolo (11 March 2009, reclassified as public on 24 March 2009) (confidential decision by the Presidency)
[157] Jean Flamme, supra note 147.
[158] Confirmation of charges hearing transcript, ICC-01/04-01/07, Katanga and Ngudjolo, (16 July 2008) at 6, para. 17-23

generated enormous publicity but which arguably had little but symbolic value, given the non-specificity of the argumentation and the amount of evidence supporting the charges. Defence Counsel in Katanga raised the issue of the undue prejudice an accused person suffers as a result of the Confirmation of charges hearing:

> [Y]ou have made every effort, Madam President, throughout this hearing to - to remind us and the parties that this is not a trial, nor is it a mini trial, but a procedure which has as its objective the assessment of the evidence with a view to confirming or not confirming charges. We feel that your advice, daily advice, has from time to time perhaps been lost sight of in the course of this hearing, and particularly yesterday by many of the parties, including the Prosecution. This may largely be a product, we feel and reflect, on the public nature of this hearing, but perhaps this is an issue that deserves revisiting by the States Parties. One of the problems, of course, of such a public hearing, particularly when counsel are involved, and we're all vulnerable to this, is that it generates rhetoric, and rhetoric perhaps has no place in this particular procedure. We hope something can be done to address the problem in respect of those who follow us. We refer, for example, to the procedure for grand jury presentation in the United States, or from my own experience in respect of prima facie hearings in the United Kingdom where there's an embargo, for example, on all publicity and very limited information is allowed to be published in respect of such a hearing. In fact, it's really reduced to merely the name of the accused and the charges upon which committal has taken place, because otherwise it is very capable of inflicting an injustice on the accused person. He's not here to be placed in a public pillory and such a system, perhaps, is not the greatest encouragement to participation by the accused person.[159]

[159] Confirmation of charges hearing transcript, ICC-01/04-01/07-T-50, Katanga and Ngudjolo, (16 July 2008) at 6 -7, paras. 17-23.

CHAPTER THREE

RULES OF PROCEDURE AND EVIDENCE

3.1 Under Rule 84[160] on Disclosure and additional evidence for trial

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

According to Rule 86[161] it states the general rule as a Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.

Rule 87(1)[162] states that upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

[160] International Criminal Court: Rules of Procedure and Evidence; 2019
[161] Ibid
[162] Super Note 160

3.2 Application for participation of victims in the proceedings

According to Rule 89(1)[163] In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

According to Rule 89(2) the Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.

According to Rule 89(3)[164] An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.

Rule 89(4)[165] Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

3.3 Legal representatives of victims

Rule 90(2)[166] Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or

[163] The Rules of Procedure and Evidence are reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (ICC-ASP/1/3 and Corr.1), part II.A.: International Criminal Court 2019

[164] *Ibid*

[165] *Ibid*

[166] International Criminal Court 2019: The Rules of Procedure and Evidence are reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002*

representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

Rule 90(3)[167] If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.

Rule 90 (4)[168] The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.

3.4 Place of the proceedings

Rule 100(1)[169] In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part.

Rule 100(2)[170] The Chamber, at any time after the initiation of an investigation, may proprio motu or at the request of the Prosecutor or the defence, decide to make a recommendation changing the place where the Chamber sits. The judges of the Chamber shall attempt to achieve unanimity in their recommendation, failing which the recommendation shall be made by a majority of the judges. Such a recommendation shall take account of the views of the parties, of the victims and an assessment prepared by the Registry and shall be addressed to the Presidency. It shall be made in writing and specify in which State the Chamber would sit. The assessment prepared by the Registry shall be annexed to the recommendation.

Rule 100 (3)[171] The Presidency shall consult the State where the Chamber intends to sit. If that State agrees that the Chamber can sit in that State, then the decision to sit in a State other than the host State shall be taken by the Presidency in consultation with the Chamber. Thereafter, the

[167] Ibid
[168] Ibid
[169] As amended by resolution ICC-ASP/12/Res.7.
[170] As amended by resolution ICC-ASP/12/Res.7.
[171] Ibid

Chamber or any designated Judge shall sit at the location decided upon.

3.5 Investigation and prosecution

3.5.1 Evaluation of information by the Prosecutor

Under rule 104(1)[172] it provides that in acting pursuant to article 53, paragraph 1, the Prosecutor shall, in evaluating the information made available to him or her, analyse the seriousness of the information received.

According to rule 104(2)[173] it states that for the purposes of sub-rule 1, the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. The procedure set out in rule 47 shall apply to the receiving of such testimony.

3.5.2 Notification of a decision by the Prosecutor not to initiate an investigation

According to rule 105(1) When the Prosecutor decides not to initiate an investigation under article 53, paragraph 1, he or she shall promptly inform in writing the State or States that referred a situation under article 14, or the Security Council in respect of a situation covered by article 13, paragraph (b). This was looked relation to rule 105(2) when the Prosecutor decides not to submit to the Pre-Trial Chamber a request for authorization of an investigation, rule 49 shall apply.

Under rule 107(2)[174] the Pre-Trial Chamber may request the Prosecutor to transmit the information or documents in his or her possession, or summaries thereof, that the Chamber considers necessary for the conduct of the review.

According to rule 107(3)[175] The Pre-Trial Chamber shall take such measures as are necessary under articles 54, 72 and 93 to protect the information and documents referred to in sub-rule 2

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[172] International Criminal Court 2019: The Rules of Procedure and Evidence are reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002*

[173] *Ibid*

[174] International Criminal Court 2019; Section II. Procedure under article 53, paragraph 3

[175] *Ibid*

and, under article 68, paragraph 5, to protect the safety of witnesses and victims and members of their families.

3.5.3 Decision of the Pre-Trial Chamber

A decision of the Pre-Trial Chamber[176] under article 53, paragraph 3 (a), must be concurred in by a majority of its judges and shall contain reasons. It shall be communicated to all those who participated in the review. Where the Pre-Trial Chamber requests the Prosecutor to review[177], in whole or in part, his or her decision not to initiate an investigation or not to prosecute, the Prosecutor shall reconsider that decision as soon as possible.

3.5.4 Collection of evidence

According to Rule 111(1)[178] it state that a record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. It shall also be noted when someone has not signed the record as well as the reasons therefor.

The Pre-Trial Chamber may[179], on its own initiative or at the request of the Prosecutor, the person concerned or his or her counsel, order that a person having the rights in article 55, paragraph 2, be given a medical, psychological or psychiatric examination. In making its determination, the Pre-Trial Chamber shall consider the nature and purpose of the examination and whether the person consents to the examination.

According to Rule 114(1) states that upon being advised by the Prosecutor in accordance with article 56, paragraph 1 (a), the Pre-Trial Chamber shall hold consultations without delay with the Prosecutor and, subject to the provisions of article 56, paragraph 1 (c), with the person who has

[176] Rule 108(1) of the International Criminal Court 2019
[177] Rule 108(2) of the International Criminal Court 2019
[178] Section III of International Criminal Court 2019
[179] Rule 113(1) International Criminal Court 2019

been arrested or who has appeared before the Court pursuant to summons and his or her counsel, in order to determine the measures to be taken and the modalities of their implementation, which may include measures to ensure that the right to communicate under article 67, paragraph 1 (b), is protected.

3.6 Procedures in respect of restriction and deprivation of liberty

Rule 117(1)[180] The Court shall take measures to ensure that it is informed of the arrest of a person in response to a request made by the Court under article 89 or 92. Once so informed, the Court shall ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber under article 58 and any relevant provisions of the Statute. The documents shall be made available in a language that the person fully understands and speaks.

Rule 117(2)[181] states that at any time after arrest, the person may make a request to the Pre-Trial Chamber for the appointment of counsel to assist with proceedings before the Court and the Pre-Trial Chamber shall take a decision on such request.

According to clause 3[182] it says that challenge as to whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b), shall be made in writing to the Pre-Trial Chamber. The application shall set out the basis for the challenge. After having obtained the views of the Prosecutor, the Pre-Trial Chamber shall decide on the application without delay.

Under the rule 117(4)[183] when the competent authority of the custodial State notifies the Pre-Trial Chamber that a request for release has been made by the person arrested, in accordance with article 59, paragraph 5, the Pre-Trial Chamber shall provide its recommendations within any time limit set by the custodial State.

According to rule 117(5)[184] When the Pre-Trial Chamber is informed that the person has been granted interim release by the competent authority of the custodial State, the Pre-Trial Chamber shall inform the custodial State how and when it would like to receive periodic reports on the

[180] Ibid
[181] Ibid
[182] Rule 117 of the International Criminal Court 2019
[183] The International Criminal Court 2019
[184] Ibid

status of the interim release.

Under Clause 1[185] the Court shall take measures to ensure that it is informed of the arrest of a person in response to a request made by the Court under article 89 or 92. Once so informed, the Court shall ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber under article 58 and any relevant provisions of the Statute. The documents shall be made available in a language that the person fully understands and speaks.

3.7 Pre-trial detention at the seat of the Court

Rule 118(1)[186] states that if the person surrendered to the Court makes an initial request for interim release pending trial, either upon first appearance in accordance with rule 121 or subsequently, the Pre-Trial Chamber shall decide upon the request without delay, after seeking the views of the Prosecutor.

According to rule 118(2)[187] The Pre-Trial Chamber shall review its ruling on the release or detention of a person in accordance with article 60, paragraph 3, at least every 120 days and may do so at any time on the request of the person or the Prosecutor.

After the first appearance[188], a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. The Pre-Trial Chamber shall decide after having received observations in writing of the Prosecutor and the detained person. The Pre-Trial Chamber may decide to hold a hearing, at the request of the Prosecutor or the detained person or on its own initiative. A hearing must be held at least once every year.

Under rule 119 (1)[189] the Pre-Trial Chamber may set one or more conditions restricting liberty, including the following: (a) The person must not travel beyond territorial limits set by the Pre-Trial Chamber without the explicit agreement of the Chamber;(b) The person must not go to certain places or associate with certain persons as specified by the Pre-Trial Chamber; (c) The person must not contact directly or indirectly victims or witnesses; (d) The person must not

[185] Rule 117 of the International Criminal Court [2019]
[186] Supra Note 183
[187] Ibid
[188] Ibid
[189] The International Criminal Court [2019]

engage in certain professional activities; (e) The person must reside at a particular address as specified by the Pre-Trial Chamber; (f) The person must respond when summoned by an authority or qualified person designated by the Pre-Trial Chamber; (g) The person must post bond or provide real or personal security or surety, for which the amount and the schedule and mode of payment shall be determined by the Pre-Trial Chamber; (h) The person must supply the Registrar with all identity documents, particularly his or her passport.

3.8 Proceedings before the confirmation hearing

A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber[190], in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67. At this first appearance, the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges. It shall ensure that this date, and any postponements under sub-rule 7, are made public.

In accordance with article 61, paragraph 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. During disclosure: (a) The person concerned may be assisted or represented by the counsel of his or her choice or by a counsel assigned to him or her; (b) The Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a judge of the Pre-Trial Chamber shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person; (c) All evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber.

[190] Rule 121 of the International Criminal Court

CHAPTER FOUR

DECIDED CASES HELD AT INTERNATIONAL CRIMINAL COURT

4.0 Introduction

So far, the International Criminal Court opened investigations in 11 situations[191]: Burundi; two in the Central African Republic; Côte d'Ivoire; Darfur, Sudan; the Democratic Republic of the Congo; Georgia; Kenya; Libya; Mali; and Uganda.

Acquitted; on 18 December 2012, Trial Chamber II acquitted Mathieu Ngudjolo Chui of the charges of war crimes and crimes against humanity and ordered his immediate release. The Prosecution appealed the verdict on 20 December 2012. On 27 February 2015, the verdict was upheld by the Appeals Chamber.

A case on ***Dominic Ongwen & others V International Criminal Court in the Hague January 26, 2015***. In July 2005, the ICC issued sealed arrest warrants for war crimes and crimes against humanity for the LRA's top five leaders at that time: Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen. The warrants were unsealed in October 2005. Lukwiya was killed in 2006 and Otti in late 2007. Odhiambo's body was found in the Central African Republic in early 2015. Kony remains at large, and his fighters remain a serious threat to civilians in the border region between the Central African Republic, South Sudan, and northeastern Congo.

The ICC initially charged Ongwen with criminal responsibility for crimes committed in northern Uganda in 2004 at the camp for internally displaced persons at Lukodi – three counts of crimes against humanity and four counts of war crimes. In September 2015, the prosecutor gave notice of additional charges. These include murder, torture, enslavement, and pillage as part of attacks on four camps for internally displaced persons: Pajule, Odek, and Abok, in addition to Lukodi. Added charges also include sexual and gender-based crimes, and conscription and use of child soldiers in northern Uganda from July 2002 through 2005.

[191] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic". ICC. 2016-09-29. Retrieved 2016-09-30

A confirmation of charges proceeding in Ongwen's case was held from January 21 to 27, 2016. The prosecutor was required to present sufficient evidence to establish substantial grounds that the defendant committed the crimes for the charges to be confirmed and the case to proceed to trial. On March 23, the ICC's Pre-Trial Chamber II confirmed the charges against Ongwen.

Under the Rome Statute, the ICC only prosecutes cases when national courts are unable or unwilling to prosecute. Once a case has been taken up by the ICC, as in the Ongwen case, it would only revert to national courts on the basis of what is known as an admissibility challenge, in which a country can show that it is investigating and prosecuting him for the same crimes.

4.1 The International Criminal Court v The United States in Afghanistan

The U.S. government moved toward a more pragmatic policy of working with the court where their objectives and interests coincided. The era of warming relations between the court and the U.S. government began in earnest during the Bush Administration, when Secretary of State Condoleezza Rice traveled to the United Nations to cast a vote helping to ensure that the situation in Darfur would be referred to the ICC. The Obama Administration voted for two further U.N. referrals. In recent years, the United States helped deliver ICC fugitives Bosco Ntaganda and Dominic Ongwen to The Hague. The U.S. Congress even got involved, with bipartisan legislation allowing the State Department to fund multi-million-dollar rewards for information helping to bring ICC fugitives to justice. Though the court has struggled to be effective (with only nine convictions in the course of 15 years), the United States treated it almost as a partner in efforts to deter and mitigate mass atrocities in places where the U.S. government lacked the capacity to do so on its own.

The U.S. government made its views known to Bensouda's team, but over time it became increasingly clear that multiple factors pulled in the other direction. The Prosecutor's office was under enormous pressure to broaden the scope of its efforts substantially beyond the cluster of sub-Saharan countries that have been the primary focus of the court's investigatory work to date. Human rights NGOs built a public case that the U.S. government had not adequately investigated allegations of torture and other abuse during the Bush Administration and lobbied for the ICC to step in as a vehicle for accountability if not also deterrence. Especially given the trend in expert

opinion, accepting the U.S. view of gravity would have been seen by many of the court's most vocal supporters (as well as its detractors) as an illegitimate nod to pragmatism. Moreover, ICC judges have in at least one prominent situation signaled that they prefer to see the Prosecutor err on the side of inclusion when seeking permission to proceed with an investigation. In 2015, a pre-trial chamber second guessed the Prosecutor for deciding not to pursue alleged abuses by Israeli sailors in the context of the Mavi Marmara flotilla incident in which 10 people were killed (although an appellate panel's subsequent ruling blunted the impact of this decision).

4.2 Findings from ICC

4.2.1 Do victims have to travel to the seat of the Court in The Hague?

Generally, victims do not have to travel to the seat of the Court if they do not wish to do so. Their legal representatives present their views and concerns to the Court.

4.2.2 How can victims find a legal representative?

Victims may freely choose their legal representative as long as the representative has the necessary qualifications: he or she must possess ten years' experience as judge, prosecutor or lawyer in criminal proceedings and fluency in at least one of the working languages of the Court (English or French). The ICC Registry helps victims to find a legal representative by providing a list of qualified lawyers. At the Court, there is also an Office of Public Counsel for Victims (OPCV) which can represent victims and provide them and their legal representative with legal assistance.

If there are a large number of victims, the judges may ask them to choose one or more common legal representatives. This is called common legal representation, and its purpose is to ensure the effectiveness of the proceedings.

4.2.3 What happens if the victims cannot afford a legal representative?

Although the Court has limited resources for legal assistance, it may be able to provide some financial assistance. The Office of Public Counsel for Victims can also provide legal assistance to victims without charge.

4.2.4 What is the role of the Office of Public Counsel for Victims?

The Office of Public Counsel for Victims (OPCV) provides legal support and assistance to victims and their legal representatives at all stages of the proceedings, thus ensuring their effective participation and the protection of their rights.

The OPCV falls within the remit of the Registry solely for administrative purposes, but operates as a wholly independent office.

4.2.5 Does the Court protect victims participating in proceedings?

The Victims and Witnesses Unit within the Registry may advise the Court on appropriate protective measures and security arrangements for victims who appear before the Court and others who are at risk on account of testimony given by witnesses. The Unit implements the necessary protective and security measures and arrangements for the above-mentioned persons.

In the course of their field work, all of the Court's organs must adhere to good practices in order to ensure their security and that of individuals who interact with them. Protective measures may, for example, include anonymity for victims participating in proceedings, the use of pseudonyms, the redaction of documents or the prohibition of disclosure thereof and the use of audiovisual techniques which can disguise the identity of persons appearing before the Court.

4.2.6 What decisions may the judges take concerning reparations for victims at the end of a trial?

At the end of a trial, the Trial Chamber may order a convicted person to pay compensation to the victims of the crimes of which the person was found guilty. Reparations may include monetary compensation, return of property, rehabilitation or symbolic measures such as apologies or memorials.

The Court may award reparations on an individual or collective basis, whichever is, in its opinion, the most appropriate for the victims in the particular case. An advantage of collective reparations is that they provide relief to an entire community and help its members to rebuild their lives, such as the building of victim services centres or the taking of symbolic measures.

Furthermore, States Parties to the Rome Statute have established a Trust Fund for Victims of crimes within the jurisdiction of the ICC and for their families in order to raise the funds necessary to comply with an order for reparations made by the Court if the convicted person does not have sufficient resources to do so.

4.2.7 What is the role of the Trust Fund for Victims?

The Rome Statute created two independent institutions: the International Criminal Court and the Trust Fund for Victims.

While it is impossible to fully undo the harm caused by genocide, war crimes, crimes against humanity and the crime of aggression, it is possible to help survivors, in particular, the most vulnerable among them, rebuild their lives and regain their dignity and status as fully-functioning members of their societies.

The Trust Fund for Victims advocates for victims and mobilises individuals, institutions with resources, and the goodwill of those in power for the benefit of victims and their communities. It funds or sets up innovative projects to meet victims' physical, material, or psychological needs. It may also directly undertake activities as and when requested by the Court.

The Trust Fund for Victims can act for the benefit of victims of crimes, regardless of whether there is a conviction by the ICC. It cooperates with the Court to avoid any interference with ongoing legal proceedings.

4.2.8 Do victims have to first participate in the proceedings before they are entitled to reparations?

No. A victim who has not participated in the proceedings may make an application for reparations. The two applications are independent of each other. The Court may even decide on its own to make an award for reparations.

4.3 Witness Protection

4.3.1 Who can be a witness?

The Office of the Prosecutor, the Defence or victims participating in the proceedings can ask experts, victims or any other person who has witnessed crimes to testify as a witness before the Court.

4.3.2 What criteria does the Office of the Prosecutor use to select witnesses?

The Office of the Prosecutor selects witnesses based on the relevance of their testimony, their reliability and their credibility.

4.3.3 Are witnesses compelled to testify?

No. The Court does not compel a witness to appear before it to testify without his or her consent.

4.3.4 How does the Court know that witnesses are not lying?

Various measures have been put in place to prevent false testimony. Before testifying, each witness makes an undertaking to tell the truth. The judges have the authority to freely assess all evidence submitted in order to determine its relevance or admissibility. If a witness gives false testimony, the Court may sanction him or her by a term of imprisonment not exceeding five years and/or by imposing a fine.

4.3.5 How are witnesses who appear before the Court assisted?

Witnesses who appear before the Court are provided with information and guidance. For this purpose, the Victims and Witnesses Unit's (VWU's) support team offers services including the provision of psychosocial support, crisis intervention, and access to medical care when needed.

The VWU also prepares all witnesses testifying before the Court by a process called "familiarisation". This is a process where the courtroom and trial procedure is shown to the witnesses in advance of their testimony. Many witnesses will have never been in a courtroom before and may find it daunting. This could impact on their well-being, as well as their

testimony, and the familiarisation process aims to avoid this. Familiarisation does not have an impact on the content of the testimony, as the evidence is not discussed at all during this process.

4.3.6 What are the protective measures available to witnesses testifying before the Court?

The Court has a number of protective measures that can be granted to witnesses who appear before the Court and other persons at risk on account of testimony given by a witness. The foundation of the Court's protection system is good practices which are aimed at concealing a witness' interaction with the Court from their community and from the general public. These are employed by all people coming into contact with witnesses.

Operational protective measures can be implemented where witnesses reside; for example the Initial Response System is a 24/7 emergency response system that enables the Court, where feasible, to extract witnesses to a safe location should they be targeted or in fear of being targeted. Other operational protective measures include educating witnesses on the importance of confidentiality and cover stories or agreeing on an emergency backup plan.

The Court can also apply procedural protective measures. Such measures may consist of face/voice distortion or the use of a pseudonym. Separate special measures can be ordered by the Court for traumatised witnesses, a child, an elderly person or a victim of sexual violence. These can include facilitating the testimony of witnesses by allowing a psychologist or family member to be present while the witness gives testimony or the use of a curtain to shield the witness from direct eye contact with the accused.

A last resort protective measure is entry into the Court's Protection Programme (ICCPP) through which the witness and his or her close relatives are relocated away from the source of the threat. This is an effective method of protection, but due to the immense burden on the relocated persons, relocation remains a measure of last resort and absolute necessity.

Protective measures do not affect the fairness of a trial. They are used to make witnesses safe and comfortable. They apply for both referring parties, the Prosecution and the Defence equally. All parties are bound by confidentiality and respect to protective measure, yet even when protective measures are applied, witness can still be questioned.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1 Conclusions

According to Art 1[192] for the application of article 110, paragraph 3, three judges of the Appeals Chamber appointed by that Chamber shall conduct a hearing, unless they decide otherwise in a particular case, for exceptional reasons. The hearing shall be conducted with the sentenced person, who may be assisted by his or her counsel, with interpretation, as may be required. Those three judges shall invite the Prosecutor, the State of enforcement of any penalty under article 77 or any reparation order pursuant to article 75 and, to the extent possible, the victims or their legal representatives who participated in the proceedings, to participate in the hearing or to submit written observations. Under exceptional circumstances, this hearing may be conducted by way of a videoconference or in the State of enforcement by a judge delegated by the Appeals Chamber.

The same three judges shall communicate the decision and the reasons for it to all those who participated in the review proceedings as soon as possible[193].

For the application of article[194] 110, paragraph 5, three judges of the Appeals Chamber appointed by that Chamber shall review the question of reduction of sentence every three years, unless it establishes a shorter interval in its decision taken pursuant to article 110, paragraph 3. In case of a significant change in circumstances, those three judges may permit the sentenced person to apply for a review within the three-year period or such shorter period as may have been set by the three judges.

For any review under article 110, paragraph 5, three judges of the Appeals Chamber appointed by that Chamber shall invite written representations from the sentenced person or his or her counsel, the Prosecutor, the State of enforcement of any penalty under article 77 and any reparation order pursuant to article 75 and, to the extent possible, the victims or their legal representatives who participated in the proceedings. The three judges may also decide to hold a

[192] Rule 224 International Criminal Court
[193] Art 2 of Rule 224
[194] Art 3 of the Rule 224 of International Criminal Court

hearing.

The decision and the reasons for it shall be communicated to all those who participated in the review proceedings as soon as possible.

If the sentenced person has escaped, the State of enforcement shall, as soon as possible, advise the Registrar by any medium capable of delivering a written record. The Presidency shall then proceed in accordance with Part 9[195].

However, if the State in which the sentenced person is located agrees to surrender him or her to the State of enforcement, pursuant to either international agreements or its national legislation, the State of enforcement shall so advise the Registrar in writing. The person shall be surrendered to the State of enforcement as soon as possible, if necessary in consultation with the Registrar, who shall provide all necessary assistance, including, if necessary, the presentation of requests for transit to the States concerned, in accordance with rule 207. The costs associated with the surrender of the sentenced person shall be borne by the Court if no State assumes responsibility for them.

If the sentenced person is surrendered to the Court pursuant to Part 9, the Court shall transfer him or her to the State of enforcement. Nevertheless, the Presidency may, acting on its own motion or at the request of the Prosecutor or of the initial State of enforcement and in accordance with article 103 and rules 203 to 206, designate another State, including the State to the territory of which the sentenced person has fled.

In all cases, the entire period of detention in the territory of the State in which the sentenced person was in custody after his or her escape and, where sub-rule 3 is applicable, the period of detention at the seat of the Court following the surrender of the sentenced person from the State in which he or she was located shall be deducted from the sentence remaining to be served.

[195] Art 1 Rule 225 International Criminal Court

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