LL.M Thesis on: “The change of legal characterization of facts at the ICC through the evaluation of indirect evidence?”

“An End To Impunity: From Justice To Peace”

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"True Peace is not merely the absence of war; it is the presence of Justice.
If you want Peace work for Justice."

PREFACE

The present LL.M research aimes to contribute to a very significant issue of International Criminal Law, which at first glance it seems to be a procedural issue but, in depth, it can be characterized as an extremely important substantial issue, in order to put an end to impunity of those persons with individual criminal responsibility, being responsible of such crimes, which offend human dignity and humanity in general.

For the purposes of the research, the present essay is devided in two Parts examining the two main and crucial topics and issues. Part A "Evaluation of Indirect Evidence" and Part B "Modification of the Legal Characterization of facts in the ICC System", both in the framework and context of ICC system. Particularly, Part A is dealing with two issues which constitute two separate Chapters. Chapter I examines the "Evidentiary Rules" in general and Chapter II attempts an "Approach to Indirect Evidence". Similarly, Part B approaches two issues which constitute two separate Chapters. Chapter I examines the "Conceptual Background" of the possibility of the modification of the legal characterization of facts after the confirmation of charges while Chapter II is dealing with "Authority to Change the Legal Characterization of Facts to Accord with ''the Form of Participation of the Accused under Articles 25 and 28 ICC Statute'' or with ''the Crimes under Articles 6, 7, 8 ICC Statute''where different cases of ICC are being analysed.

The present research is conluding with debriefing Conclusions over the practice that is being adopted from the ICC concerning the issue in question.

INTRODUCTION

The ICC is an independent and autonomous intergovernmental organization with international legal personality and powers to request cooperation from the States Parties (art. 4 and Part 9 ICC St.). The ICC St. explicitly requires these States to 'cooperate fully with the Court' and to ensure that national law allows all specified forms of cooperation (arts. 86 and 88 ICC St).[1]

Without an international police force to carry out the investigation and to enforce Court orders, the investigation depends very much on the cooperation of States and other entities such as peace-keeping forces, international military or police forces. The Prosecutor is entitled to seek cooperation from States and others in the investigation (art. 54(2)(c) ICC St., as well as provisions in the respective ICC RPE).[2] The successful operation of these institutions is completely dependent upon international cooperation. They may not and cannot themselves implement their decisions, such as an arrest warrant, on the territory of a State, and they do not have their own police force. Cooperation is therefore at the heart of effective international criminal proceedings, but this dependence has led to many difficulties in practice.[3]

The ICC applies the same scheme to intergovernmental organizations as to non-States Parties and cooperation thus depends on a voluntary commitment (αrt. 87(6) ICC St.). For example, a cooperation agreement has been concluded with the European Union.[4] A special relationship exists between the ICC and the United Nations and matters having an impact on cooperation are addressed in a Relationship Agreement.[5]

Quite apart from the fact that the resources are limited, international investigations and prosecutions are very complex, factually, legally and politically, and therefore more time-consuming than most domestic ones.[6] The dependence upon cooperation

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[1] See, Claus Kreß, 'Penalties, Enforcement and Cooperation in the International Criminal Court', European Journal of Crime, Criminal Law and Criminal Justice, 1998 (6), p. 442 at 450

[2] One form of assistance is an order to a State for production of documents, which requires a sufficient level of specificity and a 'fishing expedition' is not allowed; see ICTY, AC, Prosecutor v. Blaškic, Judgement on the request of the Republic Of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, Case no. IT-95-14, 29 October 1997, par. 32, subsequently codified in r. 54bis of the ICTY RPE. See also r. 116 ICC RPE

[3] Cryer R., Hakan F., Robinson D., Wilmshurst E., An introduction to international criminal law, second edition, Cambridge University Press, New York, 2010, p. 509; See Mark Harmon and Fergal Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings', Journal for International Criminal Justice, 2004(2), p. 403, and Yolanda Gamarra and Alejandra Vicente, 'United Nations Member States' Obligations Towards the ICTY: Arresting and Transferring Lukic´ , Gotovina and Zelenenovic´ ', International Criminal Law Review, 2008 (8), p. 627

[4] Agreement between the International Criminal Court and the European Union on Cooperation and Assistance of 10.4.2006 (ICC-PRES/01–01–06)

[5] Art. 2 of the ICC Statute and the Relationship Agreement between the International Criminal Court and the United Nations of 4.10.2004 (ICC-ASP/3/Res.1)

[6] Supra note 3, p. 436

by States and others has led to the metaphorical description as a 'giant without arms or legs'.[7]

In matters of evidentiary rules the procedures of the Court, with its unique mixture of common and civil law rules on procedure and evidence, does not purport to conform to any particular system or tradition. The need for a fair determination is the main subject.

The collection of evidence in international criminal justice is difficult.[8] Mark Harmon, former Senior Trial Prosecutor at the ICTY, has underlined the difficulties faced by investigators looking for witnesses in conflict zones with poor infrastructure, which differs significantly from the reality in a courtroom in Hague.[9]

The complex factual situations, the large amount of evidence and difficulties in obtaining it are all reasons that should be taken into consideration for flexibility, but this also raises issues of fairness and efficiency of the proceedings. Generally, the 'probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness are decisive factors for a ruling on admissibility or relevance (art. 69(4) of the ICC St.). Also, the Chambers are not to be bound by national rules of evidence (Art. 69(8) of the ICC St. and r. 63(5) of the ICC RPE).[10]

The OTP is investigating increasingly complex organizational structures that do not fit the model of traditional, hierarchical organizations. It is doing so with more limited investigative tools than are at the disposal of national law enforcement agencies. It can only do so if there is full cooperation from States and all partners involved. Cooperation becomes more than ever before a critical success factor if the OTP is to produce positive results. As the resources are not sufficient to meet this demand the need for intensive cooperation with States and other entities is obvious in the strategic plan of the OTP for the 2012-2015. The developing jurisprudence indicates that the OTP needs to be (more) trial-ready at an earlier stage in the proceedings. The judges require of the OTP to submit more and different kinds of evidence than what the OTP considered would suffice in its focused investigations and prosecutions approach.

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[7] Cassese Antonio, On Current Trends Towards the Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, European Journal of International Law,1998 (9), p. 2-17

[8] See, e.g., David Chuter, War Crimes: Confronting Atrocity in the modern world, Lynne Rienner Publishers, 2003, p. 139–49; Robert Cryer, Prosecuting International Crimes, Selectivity and the International Criminal Law Regime, Cambridge Studies in International and Comparative Law ed., 2005, 142–59; Blewitt G., "The International Criminal Tribunals for the Former Yugoslavia and Rwanda", in Justice for Crimes against Humanity, Lattimer M./ Sands Ph. eds., Hart Publishing, 2003, p. 145, 150–52

[9] Atrocities Crimes Litigation Year-In-Review (2011) Conference, Center for International Human Rights, Northwestern University School of Law, The Hague, March 14, 2012, available at http://www.law.northwestern.edu/legalclinic/humanrights/documents/ACL2011ConferenceTranscript.pdf

[10] Supra note 3, p. 465; Cassese Antonio (editor in chief), The Oxford Companion to International Criminal Justice, Oxford University Press, 2009, p. 315

Due to the requirement of higher evidentiary standards and the expectation of being trial-ready earlier, the notion of focused investigations is replaced by the principle of in-depth, open-ended investigations while maintaining focus. The change in strategy which is described above has been translated into strategic goals were the need for cooperation is being fortified. Among them: 1st Conduct impartial, independent, high-quality, efficient and secure preliminary examinations, investigations and prosecutions. 2nd Further improve the quality and efficiency of the preliminary examinations, the investigations and the prosecutions. 4th Enhance complementarity and cooperation by strengthening the Rome System in support of the ICC and of national efforts in situations under preliminary examination or investigation.[11]

At the ICC, the Prosecutor is in charge of the criminal investigation and under an obligation to 'investigate incriminating and exonerating circumstances equally' (a 'principle of objectivity') (art. 54(1)(a) ICC St.).[12]

In contrary to ICTY and ICTR Prosecutors who have a statutory right to conduct on-site investigations (art. 18(2) ICTY St. and art. 17(2) ICTR St.) for the ICC Prosecutors, this right is circumscribed by specific conditions and confined to non-coercive measures (art. 99(4) ICC St.). Exceptionally, however, the ICC PTC may authorize the Prosecutor 'to take specific investigative steps within the territory of a State without having secured the cooperation of that State' (arts. 54(2) and 57(3)(d) ICC St. and r. 115 ICC RPE). This requires the complete or partial collapse of the functions of the State in question.[13]But even under that situation, how easy can be the investigations by the OTP under such circumstances?

It operates in conflicts which are still ongoing and this complicates all forms of cooperation. Moreover, the ICC's activities, and hence the need for cooperation, will in many cases occur when the State most concerned is unwilling or unable to take appropriate action itself; a paradoxical effect of the complementarity principle. How could one then expect any constructive assistance from that State? The ICC cooperation regime may be strengthened and improved over time, but it is unrealistic to expect that the indirect model for enforcement will be replaced and it will therefore remain the weakest link of the Court's procedural framework. [14]

It has been stated that no trial can be run effectively without proper investigations having preceded it.[15] Nevertheless, it has also been stated that the Court expects

[11] ICC, OTP Strategic Plan, June 2012-2015, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf

[12] Supra note 3, p. 445

[13] Supra note 3, p. 446

[14] Supra note 3, p. 529

[15] Closing Gaps in the Selection of ICC Cases, HRW, Sept. 2011, http://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf

unrealistically high investigation standards from the OTP, which did not correspond with the reality in the field and which could infringe on witness protection.[16]

Any Prosecution failure "to investigate properly would have a bearing on the quality and sufficiency of the evidence presented and the matter will be finally decided by way of an examination of the said evidence pursuant to art. 61(7) ICC St."[17]

Can OTP's solution to its investigative difficulties— essentially the outsourcing of evidence gathering to third-party organizations or intermediaries—be justified and effective when conducting investigations in international criminal cases or when modifying the legal characterization of facts?

The decision to confirm or decline to confirm the charges based on the Disclosed Evidence is made in light of the evidentiary threshold applicable at the pre-trial stage, which is lower than the threshold applicable at the trial stage.[18] For the purposes of a warrant of arrest or a summons to appear it must be proven that "there are reasonable grounds to appear that the person has committed a crime within the jurisdiction of the Court (art. 58(1)(a) ICC St.). For the confirmation of charges it must be proven that there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged (art. 61(7) ICC St.). Finally, in order to convict the accused the Court must be convinced of the guilt of the accused beyond reasonable doubt (art. 66(3) ICC St.). The burden of proof lies indeed with the Prosecutor who is statutorily called, pursuant to art. 61(5) ICC St., to support each charge - and therefore each and every constituent element of the crimes and the mode of liability as charged - with sufficient evidence to convince the Chamber to the requisite threshold.[19]

Consequently, the TC is bound by a stricter standard of assessment in the determination of guilt. Thus, considering the modification of the legal characterization of facts in trial stage of the proceedings, it must be convinced ''beyond reasonable doubt'' (art. 66(3) ICC St.). The contribution of evidence at the proceedings can be

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[16] ICC, TC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v .Thomas Lubanga Dyilo, Judgment Pursuant to Article 74 of the Statute , ICC-01/04-01/06-2842, par. 196 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, at 54, available at http://www.icc-cpi.int/iccdocs/doc/doc1298128.pdf)

[17] ICC, PTC II, Situation in the Republic of Kenya in the ase of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Prosecution's Consolidated Response to Uhuru Kenyatta and Francis Muthaura Applications for Leave to Appeal the Decision on the Confirmation of Charges (ICC-01/09-02/11-384-Red and ICC-01/09-02/11-385), ICC-01/09-02/11-396, par. 51

[18] ICC, PTC II, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, par. 43

[19] ICC, PTC II, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva , Voce Witnesses, ICC-01/09-02/11-226, par. 26

proved as deus ex machina, by contributing significantly, throughout the change of the legal characterization of facts. But what is the probative value of this kind of evidence (indirect) and how can it satisfy the even greater threshold to convict the accused, bearing alsways in mind the rights of the accused: the right to be informed promptly of the nature, cause and content of the charges against him (art. 67(1)(a) ICC St.), the right of the accused to have adequate time and facilities for the preparation of his defense (art. 67 (1)(b) ICC St.), The right to be tried without undue delay (art. 67(l)(c) ICC St.), the right to examine, or have examined, adverse witnesses (art. 67(l)(e) ICC St.).

Bearing in mind that the interpretive outcomes can lead to the imprisonment of individuals, the compensation of victims, contribute to or disturb transitional justice efforts in situation countries, influence the development of customary international law, promote or undermine the coherence of international criminal law as a body of law, encourage or dissuade non-states parties to join the Court, and help to strengthen or undermine the Court's legitimacy as an independent and impartial international judicial organ, we can safely result in the fact that the interpretation and legal characterization of facts and the possibility of modification of this interpretation within the jurisdiction of the ICC, is mare than crucial.

For all the above mentioned issues this research has as a primary aim to contribute at the further development of the International Criminal Law. From the birth of the International Criminal Law many effective steps have been made but still serious issues remain and concern the Court. The interpretation of crimes within the jurisdiction of the Court, as we mentioned, is a crucial duty that the Court has to deal with. In many cases this interpretation has been proved wrongful by changing, in afterwards, the legal characterization of facts. Does the Statute provide the possibility of this change? How can the evidentiary process assist in this way? What problems the evidentiary process faces, by itself? Numerous questions that concern not only the Court but the international community at all, as the International Criminal Lw is in rise and in an adolescent period, being represented by the International Criminal Court, which has been the object of several critics until now, as is being confronted with great ambiguity, by attributing it accuses of broad and unacceptable powers of interpretation that are essentially political and legislative in nature.

PART A: EVALUATION OF INDIRECT EVIDENCE

CHAPTER I: EVIDENTIARY RULES

1. General provisions

In matters of evidentiary rules the procedures of the Court, with its unique mixture of common and civil law rules on procedure and evidence, does not purport to conform to any particular system or tradition. The need for a fair determination is the main subject.

The complex factual situations, the large amount of evidence and difficulties in obtaining it are all reasons that should be taken into consideration for flexibility, but this also raises issues of fairness and efficiency of the proceedings. There are a few rules but a rich jurisprudence of the Tribunals which have influenced the ICC law. The ICC St. is less extensive but provides a few exclusionary rules. Generally, the 'probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness are decisive factors for a ruling on admissibility or relevance (art. 69(4) of the ICC St.). Also, the Chambers are not to be bound by national rules of evidence (art. 69(8) of the ICC St. and r. 63(5) of the ICC RPE).[20]

As abovementioned, the Tribunals have already provided with certain guidelines concerning the evidence. The first guideline is that the parties should always bear in mind the basic distinction that exists between the legal admissibility of documentary evidence and the weight that documentary evidence is given in the courtroom. The second guideline is that the fact that the Chamber may, at some point in the course of the proceedings, rule against the admissibility of some particular document or other piece of evidence will not prevent that ruling being reversed at a later stage as further evidence emerges that is relevant, has persuasive value and hence justifies the admission of the evidence in question. The third guideline is that the mere admission into evidence does not in itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts.[21] Factors such as authenticity and proof of authorship will naturally assume the greatest importance in the TC's assessment of the weight to be attached to individual pieces of evidence. The threshold standard for the admission of evidence should not be set excessively high, as often documents are sought to be admitted into evidence, not as ultimate proof of guilt or innocence, but to provide a context and complete the picture presented by the evidence in general.[22] The fourth guideline is that when objections are raised on

[20] Supra note 10

[21] ICTY, TC, Prosecutor v. Brdanin and Talic, Order on the Standards Governing the Admission of Evidence, Case no. IT-99-36, 15 February 2002

[22] ICTY, TC, Prosecutor v. Delalic et al., Decision on the motion of the Prosecution for the admissibility of evidence, Case no. IT-96-21, 19 January 1998, par. 20

grounds of authenticity the TC will admit documents and video recordings and then decide what weight to give them.[23] The fifth guideline is that the parties should remember there is no blanket prohibition on the admission of documents simply on the grounds that their purported author has not been called to testify. [24] Similarly, the parties should keep in mind the fact that an unsigned and unstamped document does not a priori render it void of authenticity. In fact, the absence of a signature or an official seal may sometimes in itself be indicative of the pursuit of a criminal joint enterprise or possibly a method intentionally devised to avoid having the paternity of that document directly established. The sixth guideline relates to hearsay evidence. The position of the AC in the Aleksovski case[25], of the TC in Tadic case[26] and in Blaskic case[27] has been reiterated rendering hearsay evidence admissible. The seventh guideline is that the so called best evidence rule will be applied in the determination of matters. This means that the TC will rely on the best evidence available in the circumstances of the case and parties are directed to regulate the production of their evidence along these lines. The best evidence will depend on the particular circumstances attached to each document and to the complexity of this case and the investigations that preceded it. With the eight guideline is being drawn the attention of the parties in the exclusion of improperly obtained evidence (art. 69(7) ICC St. Lubanga case). No evidence shall be admissible if obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to and would seriously damage the integrity of the proceedings. The ninth guideline relates to the notion of reliability. The reliability is an inherent and implicit component of each element of admissibility. This is so because if the hearsay evidence offered is unreliable, then it cannot be either relevant or of probative value. Therefore it will be inadmissible. However, in respect to other documentary evidence, the TC does not agree that the determination of the issue of reliability, when it arises should be seen as a separate, first step in assessing a piece of evidence offered for admission. Last but not least, the Chambers are the guardian and guarantor of the procedural and substantive rights of the accused as it has also the delicate task of striking a balance in seeking to protect the rights of the victims and witnesses. When there is no objection to the authenticity of a document, the task of admitting evidence can be much easier. However, the Chamber will intervene ex officio to exclude from these proceedings those pieces of evidence which ought not to be admitted in evidence. Finally, will not be required the proof of the reliability of each document a precondition for the admission of evidence.[28]

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[23] Supra note 21

[24] Supra note 22, par. 22

[25] ICTY, AC, Prosecutor v. Aleksovski, Decision on Prosecutor's Appeal on Admissibility of Evidence, Case no. IT-95-14/1, 16 February 1999, par. 15

[26] ICTY, TC, Prosecutor v. Tadic, Decision on motion on hearsay, Case no. IT-94-1, 5 August 1996

[27] ICTY, TC, Prosecutor v. Blaskic, Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, Case no. IT-95-14, 26 January 1998

[28] Supra note 21

The decision to confirm or decline to confirm the charges based on the Disclosed Evidence is made in light of the evidentiary threshold applicable at the pre-trial stage, which is lower than the threshold applicable at the trial stage.[29] For the purposes of a warrant of arrest or a summons to appear it must be proven that "there are reasonable grounds to appear that the person has committed a crime within the jurisdiction of the Court (art. 58(1)(a) ICC St.). For the confirmation of charges it must be proven that there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged (art. 61(7) ICC St.). Finally, in order to convict the accused the Court must be convinced of the guilt of the accused beyond reasonable doubt (art. 66(3) ICC St.).

It is the Prosecution's and not the PTC's responsibility to collect and produce the evidence.[30] Any Prosecution failure "to investigate properly would have a bearing on the quality and sufficiency of the evidence presented and the matter will be finally decided by way of an examination of the said evidence pursuant to art. 61(7) ICC St."[31]

The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in art. 68 ICC St. or in the RPE. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to ICC St. and in accordance with the ICC RPE. These measures shall not be prejudicial to or inconsistent with the rights of the accused (art. 69(2) ICC St. and rr. 47, 67 and 68 ICC RPE). There are however, provisions on judicial notice of facts of common knowledge and on agreements between the parties regarding evidence (art. 69(6) ICC St. and r. 69 ICC RPE). [32]

The Chamber has the paramount principle of free assessment of evidence as enshrined in art. 69(4) ICC St. and r. 63(2) ICC RPE and these provisions are equally applicable in all stages of the proceedings.[33]

2. Investigations

At the ICC the requirements for the commencement of an investigation are complex. Unlike the Tribunals the ICC has global jurisdiction and specified 'trigger mechanisms' are therefore required for bringing a 'situation' before the Court. Regardless of trigger mechanisms, however, the Prosecutor must determine whether

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[29] Supra note 18, par. 43

[30] ICC, PTC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges, ICC-01/04-01/07-717, par. 86

[31] Supra note 17, par. 51

[32] Supra note 3, p. 466

[33] ICC, PTC II, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, par. 73

an investigation may be initiated in accordance with set criteria: a reasonable suspicion of a crime under the Court's jurisdiction, the admissibility of the case, in accordance with the complementarity principle and the requirement of 'sufficient gravity', and an assessment of the 'interests of justice' (art. 53(1) ICC St. and r. 48 ICC RPE). A process of information gathering and analysis thus precedes the criminal investigation.[34]

Upon a referral of the situation, the decision whether to start an investigation rests with the Prosecutor and is not subject to judicial review. A decision not to investigate may be reviewed by the PTC only if it is solely based on the 'interests of justice' criterion (art. 53(3) ICC St.). Where there is no referral, the investigation is always subject to approval by the PTC, which in turn requires 'a reasonable basis to proceed with an investigation' and a preliminary assessment of jurisdiction (art. 15(4) ICC St., reg. 49 of the ICC Reg. regarding the Prosecutor's request for authorization). Hence, a system of checks and balances between the Prosecutor and the judiciary has been built into the ICC St. regarding the sensitive issue of the commencement of an investigation.[35]An ICC investigation depends upon a positive decision by the Prosecutor and does not follow automatically from the referral of a situation. Although the drafting of art. 53 ICC St. ('shall initiate . . . unless . . . ') indicates a duty to go ahead if the conditions are met, the conditions in reality provide for a high degree of discretion. The 'interests of justice' criterion is particularly contentious and complex and it is not defined. However, the text and purpose of ICC St. clearly favour the pursuit of investigations and prosecutions when the conditions concerning the evidentiary threshold and admissibility are met. Hence, declining to proceed due to 'interests of justice' should be an exceptional decision.[36]

These are fundamental requirements which set out clear, if not high standards for proper investigations carried out by the Prosecutor on behalf of the Court and with regard to which he or she shall take, pursuant to art. 54(l)(b) ICC St., appropriate measures to ensure their effectiveness while fully respecting the rights of persons concerned, as required by art. 54(1)(c) ICC St.[37]

It is therefore the duty of the Prosecutor to conduct any investigation ab initio as effectively as possible with the unequivocal aim to assemble as expeditiously as possible relevant and convincing evidence which will enable ultimately the TC to consider whether criminal responsibility is proven 'beyond reasonable doubt'. Such

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[34] Supra note 3, p. 443; Cassese Antonio (editor in chief), The Oxford Companion to International Criminal Justice, Oxford University Press, 2009, p. 386

[35] E.g. Carsten S., "Judicial Review of Prosecutorial Discretion: On Experiments and Imperfections", in International Criminal Procedure, Sluiter G./ Friman H./ Linton S./ Vasiliev S./ Zappalà S. eds., Oxford University Press, 2013, p. 239–71

[36] Supra note 3, p. 444

[37] ICC, PTC II, Dissenting opinion of Hans Peter Kaul, Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, par. 51

determined Prosecution action without delay is also necessary because of the well-known experience that the chances of investigations to be effective and successful are gradually diminishing and fading away the more time is passing since the commission of the crime(s) in question. Furthermore, having regard to art. 21(3) ICC St. which imposes on the Court to interpret and apply the ICC St., among others, consistent with "internationally recognized human rights", the jurisprudence of the ECHR clearly establishes a requirement of "promptness and reasonable expedition" in the conduct of a criminal investigation as a conditio sine qua non of its effectiveness.[38]

At the ICC, the Prosecutor is in charge of the criminal investigation. Each investigation is conducted by a multidisciplinary team (lawyers, investigators, analysts and others) and led by a senior trial attorney. As a general rule, each Prosecutor is given the authority to take necessary measures in the investigation (art. 54(1)(b) ICC St.). A specific feature of the ICC St. is the functions of the PTC with respect to the investigation. Limited but important judicial intervention in the investigation, inspired by civil law systems, is provided for a so-called 'unique investigative opportunity', whereby the Chambers may take measures to ensure the efficiency and integrity of the proceedings and protect the rights of the Defence (art. 56 ICC St.). In addition, the Chamber has certain general functions which also apply during the investigation (art. 57(3) ICC St.). These functions include, inter alia, protection and privacy of victims and witnesses, preservation of evidence, protection of persons who have been arrested or appeared in response to a summons, and protection of national security information. In order to fulfil its functions, the PTC may request the Prosecutor to provide information: reg. 48 ICC Reg. The ICC Prosecutor, on the contrary, is under an obligation to 'investigate incriminating and exonerating circumstances equally' (a 'principle of objectivity') (art. 54(1)(a) ICC St.). [39]

As far as possible, the Court's own investigators conduct, or at least participate in, the investigative measures. This is important in order to ensure various rights and to secure the collection of evidence that can later be used in the proceedings and, sometimes, to secure the confidence and cooperation of victims and witnesses. The ICTY and ICTR Prosecutors have a statutory right to conduct on-site investigations (art. 18(2) ICTY St. and art. 17(2) ICTR St.). For the ICC, this right is circumscribed by specific conditions and confined to non-coercive measures (art. 99(4) ICC St.). Exceptionally, however, the ICC PTC may authorize the Prosecutor 'to take specific investigative steps within the territory of a State without having secured the cooperation of that State' (arts. 54(2) and 57(3)(d) ICC St. and r. 115 ICC RPE). This requires the complete or partial collapse of the functions of the State in question.[40]

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[38] Supra note 37, par. 53; See, ECHR, Bazorkina v. Russia, Judgment of 27 July 2006, Application no. 69481/01, par. 119; Tanrikidu v. Turkey, Judgment of 8 July 1999, Application no. 23763/94, par. 109

[39] Supra note 3, p. 445

[40] Supra note 3, p. 446

On-site investigations can be crucial for the criminal investigation and not only when the State is uncooperative. Having direct access to sites, victims and witnesses will generally be conducive to an effective and complete investigation. For example, potential witnesses may be reluctant to speak in the presence of national authorities in view of their recent experience; to be meaningful the questioning would have to be conducted by the international investigators alone. Their involvement on site will also offer an assurance that the investigative measures are taken in accordance with international standards and procedures, which in turn may preclude later challenges by the accused. The ICC is seen as a separate entity, not an extension of the national jurisdiction, and the Court's activities on the State territory are therefore an intrusion on the sovereignty of the State.[41]

2.1 Unsatisfactory investigations

The collection of evidence in international criminal justice is difficult.[42] Mark Harmon, former Senior Trial Prosecutor at the ICTY, underlined the difficulties faced by investigators looking for witnesses in conflict zones with poor infrastructure. "This is a raw, difficult process," he said, and the reality in the field, "actually rolling up your sleeves and having to do one of these cases" differs significantly from the reality in a courtroom in Hague.[43]

No trial can be run effectively without proper investigations having preceded it. Adequate investigations ensure that only the best quality evidence is produced before the Court and that the credibility of the Prosecutor's own witnesses is adequately tested. It also provides the Prosecutor with material to cross-examine defense witnesses and undermine their credibility where appropriate. Without adequate investigations, the ICC cannot achieve any of the goals it has set out to achieve and deliver "meaningful justice."[44]

Nevertheless, it has been stated that the Court expects unrealistically high investigation standards from the OTP, which did not correspond with the reality in the field and which could infringe on witness protection.[45] ICC Judge Kaul was apparently not of that view when he described these obligations as "fundamental

[41] Supra note3, p. 525; See, Informal Expert Paper: Fact-finding and investigative functions, para. 57, available at http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281983/state_cooperation.pdf

[42] Supra note 8

[43] Atrocities Crimes Litigation Year-In-Review (2011) Conference, Center for International Human Rights, Northwestern University School of Law, The Hague, March 14, 2012, available at http://www.law.northwestern.edu/legalclinic/humanrights/documents/ACL2011ConferenceTranscript.pdf

[44] Closing Gaps in the Selection of ICC Cases, HRW, Sept. 2011, http://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf

[45] Supra note 16

requirements which set out clear, if not high standards for proper investigations carried out by the Prosecutor on behalf of the Court."[46]

At this stage of the proceedings (before the confirmation of charges), any objections to the manner in which the investigations were conducted can only be viewed in the context of the purpose of the confirmation hearing, and should thus be regarded as a means of seeking a decision declining to confirm the charges. Rather, any objection may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the "substantial grounds to believe" threshold.[47]

Another example of such unsatisfactory investigation would be an approach which de facto is aiming, in a first phase, (only) at gathering enough evidence to reach the "sufficiency standard" within the meaning of art. 61(7) ICC St. maybe in the expectation or hope that in a further phase after the confirmation proceedings, additional and more convincing evidence may be assembled to attain the 'beyond reasonable doubt' threshold, as required by art. 66(3) ICC St. Such an approach, as tempting as it might be for the Prosecutor, would be risky, if not irresponsible: if after the confirmation of the charges it turns out as impossible to gather further evidence to attain the decisive threshold of 'beyond reasonable doubt', the case in question may become very difficult or may eventually collapse at trial, then with many serious consequences, including for the entire Court and the victims who have placed great hopes in this institution.[48]

The Chamber cannot satisfy itself solely with the evidence, which the Prosecutor claims to be relevant and reliable, in order to effectively and genuinely exercise its filtering function. Such a general approach would have the untenable consequence that Prosecution evidence would be considered as credible almost by default through the formal act of its presentation. Likewise, it would have the equally untenable consequence that the role and rights of the Defence would be dramatically and unfairly curtailed.[49]

It is not the duty of the Chamber to lessen the Prosecution's burden, but rather to assess the evidence presented and to decide whether such evidence is sufficient to establish substantial grounds to believe that each element of each of the crimes has been committed.[50]

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[46] Supra note 37, par. 51

[47] Supra note 33, par. 64; ICC, PTC I, Situation in Darfur, Sudan in the case of the Prosecutor v. Bahar Idriss Abu Garda, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, par. 48

[48] Supra note 37, par. 52

[49] Supra note 37, par. 62

[50] ICC, PTC I, Partly Dissenting Opinion of Tudge Anita Usacka, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges, ICC-01/04-01/07-717, par. 28

In case a PTC is not convinced that the investigation is complete, it may use its powers under arts. 61(7)(c) and 69(3) ICCSt. in order to compel the Prosecutor to complete his investigation before considering committing any suspect to trial.[51]

The AC permitted (only) "in certain circumstances" further investigations after confirmation, in particular "in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing [...]".[52]

Can OTP's solution to its investigative difficulties— essentially the outsourcing of evidence gathering to third-party organizations or intermediaries—be justified and effective when conducting investigations in international criminal cases or when modifying the legal characterization of facts?

The judgment in Lubanga case is scathing about the investigative failures of the Prosecutor and particularly the excessive reliance on intermediaries.[53] At this case early investigations were particularly difficult, and external support for ICC investigations was inadequate, the security problems, the volatile and unstable situation with active militia. There was general suspicion towards the work of the ICC and it was dangerous to leave the area which was under the protection of the UN.[54]

In Katanga and Ngudjolo case the same problems were faced and the same methods used to overcome them. The Prosecutor again did not put investigators on the ground, save on a limited number of occasions. Following this first mission to Bogoro, which was undertaken in early 2007, the OTP did not return to Bogoro for two years.[55] Only in 2009 did the OTP conduct a forensic investigation in Bogoro, but this was too late to have any probative value.[56] Nobody from the OTP ever visited Aveba or Zumbe, the home villages of the two accused, with the purpose of investigating.[57] The

[51] Supra note 37, par. 57

[52] ICC, AC, Situation in the Democratic republic of the Congo in the case of Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence', ICC-01/04- 01/06-568.

[53] Supra note 16; see also ICC, TC, Situation in the Democratic republic of the Congo in the case of Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence Pursuant to Article 76 of the Statute , ICC-01/04-01/07-3484

[54] Supra note 16, par. 135, 139–40, 142, 151–52, 163 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, at 34–40)

[55] ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga And Mathieu Ngudjolo Chui, Second Corrigendum to the Defence Closing Brief, ICC-01/04-01/07-3266-Corr2-Red, par. 450–54

[56] ICC, TC II, Prosecutor v. Mathieu Ngudjolo Chui, Jugement Rendu en Application de L'article 74 du Statut, ICC-01/04-02/12-3, par. 118, n. 266

[57] ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Second Corrigendum to the Defence Closing Brief, ICC-01/04-01/07-3266-Corr2-Red, par. 450–52; ICC, TC II, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Closing Statements, ICC-01/04-01/07-T-338-CONF-ENG, at 75–76. This was confirmed by the chief investigator in the case; See also ICC, TC II, Situation in the Democratic Republic of Congo in

purported reasons for avoiding onsite investigations were similar to those raised in Lubanga: the security of the OTP personnel and the safety of potential informants. A number of issues in relation to investigations spoke of security and health risks. These risks had delayed the investigations.[58] The prosecution found similar solutions as in Lubanga: reliance on third-party organizations and intermediaries.

2.2 OTP Strategic Plan 2012-2015[59]

While the past strategy has achieved a number of positive results, the OTP has to evaluate whether it is adapted to future challenges. The demand on the OTP remains very high and is not expected to decrease in the foreseeable future. The resources are not sufficient to meet this demand and the need for intensive cooperation with States and other entities is obvious in the strategic plan of the OTP for the 2012-2015.

The developing jurisprudence indicates that the OTP needs to be (more) trial-ready at an earlier stage in the proceedings. The judges require of the OTP to submit more and different kinds of evidence than what the OTP considered would suffice in its focused investigations and prosecutions approach.

The OTP is investigating increasingly complex organisational structures that do not fit the model of traditional, hierarchical organisations. It is doing so with more limited investigative tools than are at the disposal of national law enforcement agencies. It can only do so if there is full cooperation from States and all partners involved. Cooperation becomes more than ever before a critical success factor if the OTP is to produce positive results.

The OTP makes strategic changes at three levels in light of new challenges: (a). Policy: Due to the requirement of higher evidentiary standards and the expectation of being trial-ready earlier, the notion of focused investigations is replaced by the principle of in-depth, open-ended investigations while maintaining focus. The Office expands and diversifies its collection of evidence so as to meet the higher evidentiary threshold. The Office considers multiple case hypotheses throughout the investigation which further strengthen decision-making in relation to actual prosecutions. It aims at presenting cases at the confirmation hearing that are as trial-ready as possible. If

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the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Trial Hearing, ICC-01/04-01/07-T-81-Red- ENG, at 65–66.

[58] ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Trial Hearing, ICC-01/04-01/07-T-81-Red- ENG, at 8–10. See also ICC, TC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v .Thomas Lubanga Dyilo, Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”, ICC-01/04-01/06-2690-Red2, par. 126 (citing ICC, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v .Thomas Lubanga Dyilo, Prosecution’s Response to the Defence’s “Requête de la Défense aux Fins D’arrêt Définitif des Procedures”, ICC-01/04-01/06-2678-Conf, par.18

[59] ICC, OTP Strategic Plan, June 2012-2015, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf

meeting such a threshold is not possible at the moment of applying for an arrest warrant or a summons to appear, the OTP intends to only proceed with the application if there are sufficient prospects to further collect evidence to be trial ready within a reasonable timeframe; (b) Resources; and (c) Organizational performance: The main change for the Jurisdiction, Cooperation and Complementarity Division (JCCD) is the introduction of a revised cooperation model: JCCD manage the strategic international contacts to establish the cooperation framework with partners and the Investigation Division (ID) manage and support the implementation at the operational level.

The change in strategy which is described above has been translated into strategic goals were the need for cooperation is being fortified. Among them: 1. Conduct impartial, independent, high-quality, efficient and secure preliminary examinations, investigations and prosecutions. 2. Further improve the quality and efficiency of the preliminary examinations, the investigations and the prosecutions. 4. Enhance complementarity and cooperation by strengthening the Rome System in support of the ICC and of national efforts in situations under preliminary examination or investigation.

Working with partners within the international criminal justice system impartially and independently strives to bring justice to the victims of the most serious crimes of concern to the international community, to contribute to ending impunity and to the respect for the rule of law. Today the OTP is capable, with the assistance of the Registrar, States and other partners, to perform its core functions of preliminary examinations, investigations and prosecutions, according to the standards of the Office, in multiple countries under varying and difficult circumstances.

3. Disclosure of evidence

One fundamental feature of fair trial – a manifestation of ‘equality of arms’ – is the disclosure of the prosecutor’s evidence to the accused, allowing the latter to prepare for trial.[60]

At the ICC, the disclosure regime is clearly inspired by the same principles which govern disclosure before the ICTY, ICTR, and SCTL. First, disclosure of supporting material is dealt with by r. 76 ICC RPE. Secondly, inspection of material in the possession or control of the Prosecutor is governed by r. 77 ICC RPE. A mandatory counter inspection of material in the possession of the Defence is also provided in r. 78 ICC RPE. Thirdly, disclosure by the Defence, requiring by the Defence to notify the Prosecution of its intent to raise alibi or a ground for excluding criminal responsibility is governed in r. 79 ICC RPE. Fourthly, the regime in the restrictions on

[60] Supra note 3, p.462

disclosure is being modeled by rr. 81, 82 ICC RPE. Fifth, the disclosure of exculpatory evidence by the Prosecution is ruled in art. 67(2) ICC St.[61]

Estimated volume of evidence must be disclosed by the parties, as well as the Defence right to have adequate time and facilities to prepare, in accordance with art. 67(l)(b) ICC St.[62] The parties are requested to disclose different types of evidence in accordance with art. 67(2) ICC St. and rr. 76 to 79 RPE and disclose their evidence in due time before the Hearing in accordance with r. 121(3), (4) and (6) RPE.[63]

In order to perform its functions under art. 61(7) ICC St., the Chamber relies primarily on the evidence disclosed between the parties and further communicated to the Chamber in compliance with r. 121(2)(c) RPE. Disclosed evidence is part of the record of the case regardless of whether or not it was presented by the parties at the Hearing. To make its determination under art. 61(7) ICC St., the Chamber's consideration of evidence will take account of all Disclosed Evidence between the parties, including the evidence presented at the Hearing and referred to in the Supporting Documents.[64]

The Chambers play a significant role in the disclosure process and are empowered to order disclosure for the purpose of the confirmation of charges. The TC is also empowered to provide for disclosure of documents and information not previously disclosed (arts. 61(3) (PTC) and 64(3)(c) (TC) ICC St.). The ICC St. places an important obligation upon the Prosecutor to disclose evidence that is exculpatory, mitigating, or which may affect the credibility of prosecution evidence (art. 67(2) ICC St.). The ICC RPE contain provisions on disclosure by the prosecution and, regarding material offered in evidence, by the defence as well as on inspection by the other party of material subject to disclosure (r. 76–9 ICC RPE). Exceptions from disclosure are also available (r. 81-82 ICC RPE) and many have been made for protection purposes. Regarding disclosure of exculpatory evidence[65], the Prosecutor may in ex parte proceedings seek a ruling from the relevant Chamber and it is clear that such disclosure is an interest with priority status (r. 83 ICC RPE).[66]

A textual interpretation of art. 54(3)(e) ICC St. indicates that the Prosecutor may only rely on the provision for a specific purpose, namely in order to generate new evidence. This interpretation is confirmed by the context of art. 54(3)(e) ICC St.. It follows from art. 54(1) ICC St. that the investigatory activities of the Prosecutor must be directed towards the identification of evidence that can eventually be presented in

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[61] Cassese Antonio (editor in chief), The oxford Companion to International Criminal Justice, Oxford University Press, 2009, p. 299

[62] Supra note 33, par. 8

[63] Supra note 18, par. 32

[64] Supra note 18, par. 33, 36

[65] Supra note 61, p.317

[66] Supra note 3, p.464

open court, in order to establish the truth and to assess whether there is criminal responsibility under the ICC St.[67]

If the Prosecutor has obtained potentially exculpatory material on the condition of confidentiality pursuant to art. 54(3)(e) ICC St., the final assessment as to whether the material in the possession or control of the Prosecutor would have to be disclosed pursuant to art. 67(2) ICC St., had it not been obtained on the condition of confidentiality, will have to be carried out by the TC and therefore the Chamber should receive the material. The TC (as well as any other Chamber of this Court, including this AC) will have to respect the confidentiality agreement and cannot order the disclosure of the material to the defence without the prior consent of the information provider.[68] This understanding of the last sentence of art. 67(2) ICC St. coincides with the overall role ascribed to the TC in art. 64(2) ICC St. to guarantee that the trial is fair and expeditious, and that the rights of the accused are fully respected. It is furthermore confirmed by the jurisprudence of the ECHR, that the right to a fair trial requires that "the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused".[69]

This may cause difficulties with respect to the rights of the accused. A telling example is the Lubanga Dyilo case where the conflict between the provider's confidentiality requirement and the accused's right to exculpatory disclosure led the TC to stay the proceedings and order the release of the accused.[70] The prosecution was found to have entered into confidentiality agreements, routinely and in inappropriate circumstances, with the UN and others.[71] A large part of the evidence which he has collected is covered by art. 54(3)(e) ICC St., namely approximately 55% of the material relating to the investigation into the situation in the DRC, and about 8000 documents in the case of Mr. Lubanga Dyilo. The Prosecutor informed the TC that he would have to analyse more than 750 documents which he had received from the UN. In such

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[67] ICC, AC, Situation in the Democratic Republic of the Congo, the Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "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-01/04-01/06-1486, par. 41

[68] Supra note 67, par. 3

[69] ECHR: Rowe and Davis v. United Kingdom, Judgment of 16 February 2000, Application no. 28901/95, par. 60; Condron v. United Kingdom, Judgment, 2 May 2000, Application no. 35718/97, par. 65; Allan v. United Kingdom, Judgment of 19 June 2001, Application no. 36533/97, pars. 38 et seq; Dowsett v. United Kingdom, Judgment of 24 June 2003, Application no. 39482/98, pars. 44 et seq ; F v Finland, judgment, 24 April 2007, Application no. 40412/98, paragraph 78; Jasper v. United Kingdom, Judgment of 16 February 2000, Application no. 27052/95, par. 56

[70] ICC, TC I, Situation in the Democratic Republic of the Congo, the Prosecutor v. Thomas Lubanga Dyilo, 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; ICC, TC I, Situation in the Democratic Republic of the Congo, the Prosecutor v. Thomas Lubanga Dyilo, Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings", ICC-01/04-01/06-1467; Supra note 67

[71] Supra note 70, par. 72

circumstances, Mr. Lubanga Dyilo submitted, it is appropriate to speak of an abuse of art. 54(3)(e) ICC St.[72] The matter was finally resolved after arrangements were made to allow the judges to review the material and make an assessment in accordance with art. 67(2) ICC St. But the AC also held that the confidentiality agreement must be respected and hence that other counter-balancing measures must be considered if the provider does not agree to disclosure.[73]

Based on art. 21(3) ICC St. and the responsibility to ensure the fairness of the proceedings, a conditional stay of the proceedings was considered to be an appropriate remedy when disclosure of exculpatory evidence was prevented by the provider of the material; but unconditional release of the accused was held not to be an inevitable consequence of such a stay. The TC based on art. 64(2), 21(3) ICC St. stated that: If, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary - indeed, inevitable - that the proceedings should be stayed. There is, therefore, no prospect, on the information before the Chamber, that the present deficiencies will be corrected.[74] Neither the ICC St. nor the ICC RPE provides for a "stay of proceedings" before the Court. Nevertheless, it follows from art. 21(3) ICC St. that: Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped.[75]

The Prosecutor in Lubanga case underlined that the ability to be provided with confidential information is "at the core of the Prosecution's ability to fulfil its mandate". The realities of investigations in situations of ongoing conflict make it necessary that information may be provided on a confidential basis and that this ability "actually serves as a safeguard to the fairness and integrity of the proceedings".[76] When receiving material on a confidential basis, it was always clear that the Prosecutor would only use this material for the purpose of gathering new evidence, but that the Prosecutor might later seek the consent of the providers that the material in question be used as evidence. In his view, such an approach is justified in situations of mass criminality. In light of the ongoing nature of the conflict in the DRC, it is, in the view of the Prosecutor, understandable that the providers would only give him access to the material on the condition of confidentiality.[77] Furthermore, the material covered by art. 54(3)(e) ICC St. does not have to be disclosed under art. 67(2) ICC St., even if such material contains exculpatory information. In their view, the disclosure obligation exists only in respect of

[72] Supra note 67, par. 32
[73] Supra note 67, par. 3, 43–8
[74] Supra note 67, par. 58
[75] Supra note 67, par. 77
[76] Supra note 67, par. 25
[77] Supra note 67, par. 26

"evidence". Material covered by art. 54(3)(e) ICC St. cannot become evidence unless and until the information provider consents to the lifting of the confidentiality.[78]

In light of the above, the AC is not persuaded by the submission of the Prosecutor that the TC incorrectly created a category of "springboard" or "lead material", which it juxtaposed to evidence. The TC accepted that material obtained under art. 54(3)(e) ICC St. may potentially be used as evidence at a later stage expressly referred to r. 82(1) ICC RPE.[79]

The TC analyzed art. 54(3)(e) ICC St. In its view, authority to enter into confidentiality agreements under its provisions is limited to what is characterized as "lead material",[80] that is, information tending to suggest the existence of evidence that can be brought to light by the investigations of the Prosecutor. The only purpose of collecting such material or information is to generate evidence. In this case, the Prosecutor, according to the TC, collected material constituting evidence in itself. The clear inference is that the Prosecutor transgressed the provisions of art. 54(3)(e) ICC St. by receiving in confidence under its provisions not "lead material" but evidence that he would be unable to disclose to the accused except with the consent of a third party unconnected with the proceedings.[81]

The AC is not persuaded by the submission of the participating victims that art. 67(2) ICC St. does not per se apply to material that is provided to the Prosecutor under art. 54(3)(e) ICC St. While it is true that art. 67(2) ICC St. refers to "evidence" and material obtained under art. 54(3)(e) ICC St. may only be introduced into evidence once the information provider has consented, the interpretation proposed by the participating victims would mean that the Prosecutor could withhold potentially large amounts of information he has collected on the basis of confidentiality agreements, without any control by the Chamber. This would be incompatible with the requirements of a fair trial, which must guide the interpretation and application ICC St.[82]

In Lubanga case, however, material has been collected on a large scale, in particular on the basis of the ICC-UN Relationship Agreement and the MONUC Memorandum of Understanding. The Prosecutor relied on the expectation that the information providers would, at a later stage, agree to the lifting of the confidentiality, should this become necessary.[83] The AC was not persuaded by the argument that the approach of the Prosecutor to art. 54(3)(e) ICC St. was correct because he could rely on art. 18(3) of the ICC-UN Relationship Agreement. While art. 18(3) ICC-UN Relationship Agreement provides that the Prosecutor may agree that material may not be disclosed

[78] Supra note 67, par. 34
[79] Supra note 67, par. 54
[80] Supra note 70 par. 71,72
[81] Supra note 67, par. 14, 15
[82] Supra note 67, par. 43
[83] Supra note 67, par. 44

to other organs of the Court, including to the Chambers, this does not mean that reliance by the Prosecutor on this provision would be appropriate in all circumstances. The wording of art. 18(3) ICC-UN Relationship Agreement ("may agree") leaves room for other arrangements between the UN and the Prosecutor. Whenever material is offered to the Prosecutor on the condition of confidentiality, he will have to take into account the specific circumstances, including the expected content and nature of the documents, and its potential relevance to the defence. In contrast, art. 10(6) MONUC Memorandum of Understanding provided for a broad application of art. 18(3) ICC-UN Relationship Agreement. According to the first sentence of art. 10(6) MONUC Memorandum of Understanding unless otherwise specified in writing by the Under-Secretary-General for Peacekeeping Operations or an Assistant Secretary General for Peacekeeping Operations, documents held by MONUC that are provided by the UN to the Prosecutor shall be understood to be provided in accordance with and subject to the arrangements envisaged in art. 18(3) ICC-UN Relationship Agreement.[84]

Disclosure is briefly touched upon in the ICC St. and further developed in the ICC RPE and jurisprudence. Controversial questions in the negotiations were whether full disclosure of the evidence for trial should take place before or after the confirmation hearing and whether the Chambers should have access to a 'dossier'.[85] The RPE leave room for different interpretations. But it is important to note that the confirmation and the trial serve different purposes and that the evidentiary requirements differ, which is also reflected in the rules on pre-confirmation disclosure.[86]

4. Admissibility, relevance and probative value of evidence

The discretion of the Chamber in line with the principle of free assessment of evidence is limited to determining, pursuant to arts. 69(4)(7) ICC St., the admissibility, relevance and probative value of the evidence placed before it.[87] Although related, relevance and probative value on the one hand, and admissibility on the other, are distinct concepts dealt with under arts. 69(4)(7) ICC St.[88]

Article 69(4) ICC St. mentions prejudice caused to the fairness of the trial and prejudice to the "fair evaluation of the testimony of a witness". Article 69(7) ICC St. which deals specifically with evidence obtained in violation of the ICC St. or of internationally recognized human rights protects similar, but not identical, values. They are the "reliability of evidence" and the "integrity of the proceedings". Although art. 69(7) ICC St. is lex specialis in respect of the general admissibility test contained

[84] Supra note 67,par. 49, 51, 52

[85] For opposing views, see contributions by Helen Brady and Gilbert Bitti in Horst Fischer/Claus Kress/Sascha Rolf Lüder (eds), International and National Prosecution of Crimes under International Law: Current Developments, Verlag Arno Spitz, Berlin, 2001, p. 261–88

[86] Supra note 3, p.464

[87] Supra note 33, par. 74

[88] Supra note 18, par. 45

in art. 69(4) ICC St., which is broader in scope with regard to the possible forms of prejudice, the Chamber is of the view that both paragraphs, for the most part, protect the same two key values: firstly, the ICC St. protects the accuracy and reliability of the Court's fact-finding by requiring that evidence of questionable credibility be excluded; secondly, the ICC St. safeguards the moral integrity and the legitimacy of the proceedings by requiring that the process of collecting and presenting evidence is fair towards the accused and respects the procedural and human rights of all those who are involved in the trial.[89]

In determining whether there are substantial grounds to believe that the suspect committed each of the crimes charged, the Chamber is not bound by the parties characterization of the evidence. Rather, the Chamber will make its own independent assessment of each piece of evidence.[90]

4.1 Admissibility

There are no automatic grounds for exclusion in the ICC St. or ICC RPE.[91] Instead, the Chamber has the discretion to weigh the probative value of each particular item of evidence against the potentially prejudicial effect of its admission. This is a balancing test which must be carried out on a case-by-case basis. The Chamber emphasises, however, that, although the applicable admissibility test allows the Chamber wide-discretion, the Chamber has no discretion in whether or not to apply the test. Before admitting any item of evidence, the Chamber must be satisfied that the admissibility criteria have been met.[92]

Although under arts. 64(9)(a), 69(4) ICC St. relevance is a legal precondition to admissibility, it is primarily a logical standard. If the evidence tendered makes the existence of a fact at issue more or less probable, it is relevant. Whether or not this is the case depends on the purpose for which the evidence is adduced. Unless immediately apparent from the exhibit itself, it is the responsibility of the party tendering it to explain. If submissions on these points are not sufficiently clear or precise, or if the Chamber cannot ascertain the relevance of an item of evidence with reasonable precision, it may decide to reject it on those grounds.[93]

Concerning admissibility, the Chamber recalls that neither the ICC St. nor ICC RPE provide that a certain type of evidence is per se inadmissible. The Chamber may, pursuant to art. 69(4) ICC St., and shall, pursuant to art. 69(7) ICC St. and r. 63(3)

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[89] ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, par. 39

[90] Supra note 33, par. 75

[91] ICC, TC I, Prosecutor v. Thomas Lubanga Dyilo, "Decision on the admissibility of four documents", 13 June 2008, ICC-01/04-01/06-1399, par. 29: There should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall

[92] Supra note 89, par. 15

[93] Supra note 89, par. 16

ICC RPE, rule on the admissibility of the evidence on an application of a party or on its own motion if grounds for inadmissibility set out in the aforesaid provisions appear to exist.[94]

Judge Claude Jorda, acting as Single Judge in the Lubanga case, stated: [...] any item included in the Prosecution Additional List of Evidence shall be admitted into evidence for the purpose of the confirmation hearing, unless it is expressly ruled inadmissible by the Chamber upon a challenge by any of the participants at the hearing.[95]

In order to be admissible, evidence must, to some significant degree, advance the Chamber's inquiries. There are two ways in which an item of evidence can influence the Chamber's decision: (a) the item of evidence may significantly help the Chamber in reaching a conclusion about the existence or non-existence of a material fact; or (b) the item of evidence may significantly help the Chamber in assessing the reliability of other evidence in the case.[96]

Unlike relevance, there are degrees of significance, depending on the measure by which an item of evidence is likely to influence the determination of a particular issue in the case. Although some evidence may be relevant, it may not be sufficiently material to persuade or dissuade the Chamber of anything. The Chamber will thus consider what impact the admission of the evidence would have on the issues before it. If the potential impact is "little to none", then the Chamber will be unlikely to admit it as it will not advance its enquiry. If, on the other hand, the impact ranges from "some to considerable", the evidence will probably be sufficiently significant for admission.[97]

4.1.1. Reliability

The ad hoc tribunals adopt a "broad" approach to the admission of evidence, within which relevant evidence is "clearly admissible". The test applied by the ad hoc tribunals to the admissibility of statements made out of court. The Prosecution suggested that the ICTY AC has identified certain indicia of reliability which may assist the Court when determining admissibility, including the following factors: voluntariness, truthfulness, trustworthiness, the content of the statement and the circumstances in which the evidence came into existence.[98]

The Chamber concurs with TC I that there is no finite list of possible criteria that are to be applied in determining reliability. However, the following key factors will normally be considered: *a. Source:* whether the source of the information has an allegiance towards one of the parties in the case or has a personal interest in the

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[94] Supra note 18, par. 46
[95] Supra note 30, par. 89
[96] Supra note 89, par. 34
[97] Supra note 89, par. 35
[98] Supra note 91, par. 9, 10

outcome of the case, or whether there are other indicators of bias. *b. Nature* and characteristics of the item of evidence: for example, whether the evidence is an audio or video recording, automatically generated, or testimonial in nature. Other factors may include the public or private character of the information. *c. Contemporaneousness:* whether the information was obtained and recorded simultaneously or shortly after the events to which it pertains or whether the record was created at a later stage. *d. Purpose:* whether the document was created for the specific purpose of these criminal proceedings or for some other reason. *e. Adequate means of evaluation*: whether the information and the way in which it was gathered can be independently verified or tested. Although there is no prohibition on hearsay before the Court, the Chamber is conscious of the inherent risks in this type of evidence. It may therefore take such risks into consideration when attributing the appropriate probative value to items of evidence consisting mainly or exclusively of hearsay.[99]

The Prosecution noted that indicia of reliability for documentary evidence referred to by the ICTY (in addition to the above) include the source of the document, the place where it was seized, testimony concerning the chain of custody following seizure, the nature of the document (such as whether it bears a signature or stamp, its structure, whether it is a fax or a letter), the method of its transmission (where relevant), its content, the purpose for which the document was created and when it was created. [100]

The Chamber recalls that, as held by the AC, it is not required, as a matter of principle, to fully test the reliability of every piece of evidence relied upon.[101]

Despite the controversies which have arisen at the international tribunals, in particular at the ICTY, as to whether reliability is a separate or inherent component of the admissibility of a particular item of evidence, the Chamber prefers to adopt "[t]he alternative approach", that is, "to consider reliability as a component of the evidence when determining its weight." This approach is the most consistent with r. 63(2) ICC RPE according to which "[a] Chamber shall have the authority, in accordance with the discretion described in art. 64(9) ICC St., to assess freely all evidence submitted in order to determine its relevance and admissibility in accordance with art. 69 ICC St."[102]

4.1.2 Authentication

The fact that a document is not signed or dated does not automatically make it inauthentic.[103]

[99] Supra note 89, par. 27
[100] Supra note 91, par. 11
[101] Supra note 33, par. 94
[102] Supra note 30, par. 78
[103] Supra note 30, par. 112

There is no general prohibition on the admission of documents simply on the grounds that their purported author has not been called to testify. Similarly, the fact that a document is unsigned or unstamped does not, a priori, render it void of authenticity. Authenticity and proof of authorship will assume the greatest importance in the TC's assessment of the weight to be attached to individual pieces in the framework of the free evaluation of evidence". [104]

It must first be recalled that in respect of issues pertaining to the authenticity of pieces of evidence: [u]nder the framework established by the ICC St. and ICC RPE, the Chamber notes that, at the stage of the confirmation hearing, the scope of which is limited to determining whether or not a person should be committed for trial, it is necessary to assume that the material included in the parties Lists of Evidence is authentic. Thus, unless a party provides information which can reasonably cast doubt on the authenticity of certain items presented by the opposing party, such items must be considered authentic in the context of the confirmation hearing. This is without prejudice to the probative value that could be attached to such evidence in the overall assessment of the evidence admitted for the purpose of this confirmation hearing.[105]

When objections are raised on grounds of authenticity or reliability, the practise of Tribunals has been to admit documents and video recordings and then decide on the weight to be given to them within the context of the trial record as a whole.[106]

Although, it has been stated that the first issue the Chamber must consider is whether the item of evidence is authenticated. In the absence of authentication, there can be no guarantee that a document is what the party tendering it purports it to be. Under no circumstances can the Chamber admit unauthenticated documentary evidence since, by definition, such evidence has no probative value. The Prosecution's assertion that "there is no legal basis in the jurisprudence of the tribunals that proof of authenticity is a threshold requirement for the admissibility of documentary evidence", irrespective of its accuracy, is misconceived in the context of proceedings before this Court. To admit unauthenticated evidence would unjustifiably burden the record of the trial with non-probative material and serve no purpose in the determination of the truth.[107]

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[104] ICTY, TC, Prosecutor v. Martic, Decision adopting guidelines on the standards governing the admission of evidence, Case no. IT-95-11, 19 January 2006 (Annex A "Guidelines on the Standards Governing the Admission of Evidence"), par. 5; See also Supra note 21, par. 18; ICTY, TC, Prosecutor v. Mucic et al., Decision on the Motion of the Prosecution for the Admissibility of Evidence, Case no. IT-96-21, 19 January 1998, par. 33-34.

[105] Supra note 30, par. 110; ICC, PTC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, para. 97

[106] ICTY, TC, Prosecutor v. Milan Manic, Decision adopting guidelines on the standards governing the admission of evidence, Case No. IT-95- 11-T, 19 January 2006, Annex A "Guidelines on the Standards Governing the Admission of Evidence" par. 6

[107] Supra note 89, par. 22; Supra note 91

Accordingly, unless an item of evidence is self-authenticating, or the parties agree that it is authentic, it is for the party tendering the item to provide admissible evidence demonstrating its authenticity. Such evidence may be direct or circumstantial but must provide reasonable grounds to believe that the exhibit is authentic, which, although not a particularly high standard, does impose a burden of proof on the party tendering the evidence. If no authenticating evidence is provided whatsoever, the documentary evidence will be found inadmissible.[108]

4.1.3 Inconsistencies

The Chamber also examines the intrinsic coherence of each piece of evidence. As stated above, one piece of evidence may be used to prove more than one issue at stake. Therefore, inconsistencies contained within one piece of evidence have to be assessed in relation to a specific issue. Thus, inconsistencies in such a piece of evidence might be so significant as to bar the Chamber from using it to prove one specific issue, but might prove immaterial with regard to another issue, which, accordingly, does not prevent the Chamber from using it.[109]

Inconsistencies are possible within one or amongst several pieces of evidence and may have an impact on the probative value to be accorded to the evidence in question. However, inconsistencies do not lead to an automatic rejection of the particular piece of evidence and thus do not bar the Chamber from using it. The Chamber will assess whether potential inconsistencies cast doubt on the overall credibility and reliability of the evidence and, therefore, affect the probative value to be accorded to such evidence. The said assessment must be conducted with respect to the nature and degree of the individual inconsistency as well as to the specific issue to which the inconsistency pertains. In fact, inconsistencies in a piece of evidence might be so significant as to bar the Chamber from using it to prove a specific issue, but might prove immaterial with regard to another issue, which, accordingly, does not prevent the Chamber from using it regarding that issue.[110]

In the view of the Chamber, inconsistencies in the evidence alone do not require that the evidence is rejected as unreliable. Nevertheless, the Chamber retains discretion in evaluating any inconsistencies and in considering whether the evidence, assessed as a whole, is reliable and credible. Similarly, the Chamber retains the discretion to accept or reject any of the "fundamental features" of the evidence. Accordingly, the Chamber is of the view that the inconsistencies in question are such that they could impact only upon the manuscript's probative value but not its admissibility.[111]

'The presence of inconsistencies in the evidence does not, per se, require a reasonable TC to reject it as being unreliable. Similarly, factors such as the passage of time

[108] Supra note 89, par. 23
[109] Supra note 18, par. 56
[110] Supra note 33, par. 92; Supra note 18, par. 55
[111] Supra note 30, par. 116

between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the TC from relying on the evidence".[112]

4.2 Relevance and Probative Value

In assessing the Disclosed Evidence, the Chamber considers the unique nature of every single piece of evidence, the specificities of the different charges, the constituent elements of the counts, the facts of the case as well as the distinctive relations between them and the relevant piece of evidence. Thus, the Chamber takes a case-by-case approach in assessing the relevance and probative value of each piece of evidence.[113]

The Chamber assesses both the relevance and the probative value of the evidence regardless of its type (direct or indirect), and which party has disclosed it. It then determines to what extent the pieces of the Disclosed Evidence contribute to the findings of the Chamber in accordance with art. 61(7) ICC St.[114]

In evaluating the Motions, the Chamber follows the three-step approach adopted by TC I, firstly, assesses the relevance of the material, then determines whether it has probative value and finally weighs its probative value against its potentially prejudicial effect.[115]

Each item of evidence must be individually assessed for its relevance and probative value at the time it is tendered and before being admitted into evidence. If at the time of tendering an item of evidence, the party is unable to demonstrate its relevance and probative value, including its authenticity, it cannot be admitted. It does not suffice to argue that its content may be corroborated by other evidence or that the Chamber may subsequently determine its proper evidentiary weight. Probative value and evidentiary weight are two similar but distinct concepts. Under art. 69(4) ICC St., probative value is a key criterion in any determination on admissibility. It follows that the Chamber must determine the probative value of an item of evidence before it can be admitted into the proceedings. Probative value is determined on the basis of a number of considerations pertaining to the inherent characteristics of the evidence. Evidentiary weight, however, is the relative importance that is attached to an item of evidence in deciding whether a certain issue has been proven or not. It depends on the intrinsic quality and characteristics of the item of evidence, but also on the amount and quality of other available evidence on the same issue. Thus, unlike probative value, evidentiary weight is assessed at the end of a trial, when the Chamber has heard all other evidence admitted in the case. So, in arguing that the Chamber should simply

[112] ICTY, AC, Prosecutor v. Kupreskic et al, Appeal Judgement, Case no. IT-95-16, 23 October 2001, par. 31; SCSL, TC II, Prosecutor v. Brima/ Kamara/ Kanu, Judgment, Case no. SCSL-04-16-T-613, 20 June 2007

[113] Supra note 18, par. 58

[114] Supra note 18, par. 44

[115] Supra note 89, par. 14

admit the whole of the evidence unredacted and "leave any matters of reliability and probative value until the end of the trial, where the Chamber will be in a position to consider the totality of the evidence presented at trial by all parties and participants, including the Chamber itself, the Prosecution misconceives the Chamber's various duties and implies that the Chamber should disregard a crucial element of the admissibility test.[116]

The Chamber takes a case-by-case approach in assessing the relevance and probative value of each piece of evidence. In doing so, the Chamber is guided by various factors, such as the nature of the evidence, its credibility, reliability, and source as well as the context in which it was obtained and its nexus to the charges of the case or the alleged perpetrator. Indicia of reliability such as voluntariness, truthfulness, and trustworthiness are considered. In this respect, the Chamber wishes to clarify that it is not the amount of evidence presented but its probative value that is essential for the Chamber's final determination on the charges presented by the Prosecutor.[117]

4.2.1 Relevance

One and the same piece of evidence may be relevant to prove several issues or may, on the contrary, be relevant only to clarify one single question. In making its determination pursuant to art. 61(7) ICC St., the Chamber independently considers each such possible combination of pieces of evidence and their relation to the facts, the elements of the crimes and of the charges.[118]

The Prosecutor in Muthaura case asserted that: [F]or purposes of confirmation, the PTC should accept as dispositive the Prosecution's evidence, so long as it is relevant. It should avoid attempting to resolve contradictions between the Prosecution and Defence evidence, because such resolution is impossible without a full airing of the evidence from both sides and a careful weighing and evaluation of the credibility of the witnesses. That will occur at trial.[119]

Relevance requires nexus between the specific piece of evidence and a charge or a fact of the case to be proven. The Chamber holds the view that evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of an issue in a case more or less probable than it would be without that evidence. In other words, relevance is the relationship between a piece of evidence and a fact that is sought to be proven. The existence of such piece of evidence tends to increase or decrease the probability of the existence of the fact. In assessing the relevance of the evidence, the Chamber makes a determination on the extent to which it is rationally linked to the fact in question.[120]

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[116] Supra note 89, par. 13
[117] Supra note 33, par. 81
[118] Supra note 18, par. 60
[119] Supra note 33, par. 67
[120] Supra note 33, par. 79

The relevance criterion serves two different purposes. First, it is the legal basis for excluding irrelevant evidentiary material from the trial. Second, it defines the purpose of a specific item of evidence in the proceedings. If a party has tendered an item of evidence as proof of a particular proposition, the Chamber will in principle admit it only for that purpose, even if the entire exhibit is admitted into evidence. Accordingly, if the same item of evidence could also prove another proposition than the one(s) for which it was tendered, the Chamber will not consider the evidence in relation to that additional proposition, unless the parties were given an opportunity to address this aspect of the evidence.[121]

4.2.2 Probative value

Whilst the Prosecution acknowledged that the Chamber may exclude irrelevant evidence, the probative value of which is outweighed by its prejudicial effect, it argued that probative value should not be viewed in isolation but rather as part of the whole body of evidence.[122]

Probative value is determined by two factors: the reliability of the exhibit and the measure by which an item of evidence is likely to influence the determination of a particular issue in the case.[123]

Once the probative value of a particular item of evidence has been determined, the Chamber must weigh this against the potential prejudice, if any, that its admission might cause. As TC I observed, "[w]hilst it is trite to observe that all evidence that tends to incriminate the accused is also "prejudicial" to him, the Chamber must be careful to ensure that it is not unfair to admit the disputed material [...] this will always be a fact-sensitive decision, and the court is free to assess any evidence that is relevant to, and probative of, the issues in the case, so long as it is fair for the evidence to be introduced."[124]

As with probative value, it is not possible to define the meaning of prejudice exhaustively. However, when addressing issues of prejudice, the Chamber will consider two questions: (a) what causes the prejudice; and (b) what suffers the prejudice.[125]

Evidence is relevant only if it has probative value. Probative value is the weight to be given to a piece of evidence, and weight constitutes the qualitative assessment of the evidence. Each piece of evidence has to provide a certain degree of probative value in order to be constructive and decisive for the Chamber in making its determination pursuant to art. 61(7) ICC St. Accordingly, the Chamber gives each piece of evidence the weight that it considers appropriate. In making its assessment, it is not bound by

[121] Supra note 89, par. 17
[122] Supra note 91, par. 11
[123] Supra note 89, par. 20
[124] Supra note 89, par. 37
[125] Supra note 89, par. 38

the parties' characterization of the Disclosed Evidence, but makes its own assessment of each piece of evidence. In doing so, the Chamber is guided by the various factors, such as the nature of the Disclosed Evidence, the credibility, the reliability, the source from which the evidence originates, the context in which it was obtained, and its nexus to the charges of the case or the alleged perpetrator. Indicia of reliability such as voluntariness, truthfulness, and trustworthiness are taken into consideration, especially for witness statements. The Chamber also assesses to what extent each piece of evidence contributes to its findings on the charges contained in the Amended DCC.[126]

The Chamber also assesses whether each piece of evidence has probative value. The determination of the probative value of a piece of evidence requires a qualitative assessment. In this respect, the Chamber recalls the general principle of free assessment of evidence as enshrined in art. 69(4) ICC St. and r. 63(2) ICC RPE. Accordingly, the Chamber shall give each piece of evidence the weight that it considers appropriate.[127]

Additionally, if the Chamber decides that a party's challenge to a particular item of evidence or portions thereof affects its probative value, such decision does not indicate that the Chamber will not rely on such evidence or portions thereof in making its conclusions. Rather, when the Chamber determines that the probative value of an item of evidence or portions thereof is affected, for example because the evidence contains only anonymous hearsay statements or inconsistencies, the Chamber will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution. However, as with any evidence presented, the Chamber will try, whenever possible, to cite additional evidence in the record which also supports the Chamber's conclusions.[128]

5. Evidentiary compliance with domestic law

In relation to the requirement of evidentiary compliance with the domestic law of the DRC, in the Lubanga Decision the Chamber stated: [...] the Chamber observes that under art. 21(1)(c) ICC St., where arts 21(1)(a) (b) ICC St. do not apply, it shall apply general principles of law derived by the Court from national laws. The Court is not bound by the decisions of national courts on evidentiary matters. This is clear from art. 69(8) ICC St. which states that "[w]hen deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law. [129]

Whereas a violation of internationally recognized human rights in principle qualifies as a ground for exclusion of evidence, a violation of national laws on evidence does

[126] Supra note 18, par. 42, 59
[127] Supra note 33, par. 80
[128] Supra note 30, par. 70
[129] Supra note 105, par. 69; Supra note 30, par. 91

not. The reason for that is that the Court should not be burdened with decisions on matters of purely national law.[130]

6. Evidence in accordance with international standards of human rights

Under art. 69(7) ICC St. evidence obtained by means of a violation of the ICC St. or internationally recognized human rights is not admissible if a) the violation casts substantial doubt on the reliability of the evidence; or b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. Thus, the Chamber must determine whether the evidence was obtained in violation of internationally recognized human rights.[131]

Article 69(7) ICC St. rejects the notion that evidence procured in violation of internationally recognized human rights should be automatically excluded. Consequently, the judges have the discretion to seek an appropriate balance between the ICC St.'s fundamental values in each concrete case.[132]

According to some commentators, "some delegations wanted to exclude evidence obtained by means of a violation of human rights, but this formulation was regarded as too broad. "The drafters of the ICC St. opted for a narrower formula, under which the Court "will have to distinguish between minor infringements of procedural safeguards and heavier violations". Consequently, "violations of specific national rules on the conduct of an interrogation or the like were not matters upon which the Court should base a decision on exclusion''.[133]

The first limb of the alternative embodied in art. 69(7)(a) ICC St. deals with the impact of the unlawful method used to gather evidence on the reliability of such evidence, because "some forms of illegality or violations of human rights create the danger that the evidence, such as a confession obtained from a person during interrogation, may not be truthful or reliable as it may have been proffered as a result of the duress arising from the circumstances of the violation."[134]

The second limb of the alternative embodied in art. 69(7)(b) ICC St. does not pertain to the reliability of the evidence seized; rather, it concerns the adverse effect that the admission of such evidence could have on the integrity of the proceedings. The Chamber recalls that in the fight against impunity, it must ensure an appropriate balance between the rights of the accused and the need to respond to victims' and the international community's expectations. Although no consensus has emerged on this issue in international human rights jurisprudence, the majority view is that only a

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[130] Behrens H.J., "The Trial Proceedings", in International Criminal Court: The Making of the Rome Statute, Roy S. Lee ed., Kluwer Law International, 1999, p. 246
[131] Supra note 105, par. 70
[132] Supra note 105, par. 84
[133] Supra note 130
[134] Supra note 105, par. 85

serious human rights violation can lead to the exclusion of evidence.[135] The ECHR in Schenk v. Switzerland, decided that it "cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence […] may be admissible", and held that it had to ascertain only whether the trial as a whole was fair. [136]

Regarding the rules applicable before the international criminal tribunals and their jurisprudence, the generally accepted solution "is to provide for the exclusion of evidence by judges only in cases in which very serious breaches have occurred, leading to substantial unreliability of the evidence presented."[137]

Relying on the precedent established in the Prosecutor v. Delalić, the ICTY TC recalled that "it would constitute a dangerous obstacle to the administration of justice if evidence which is relevant and of probative value could not be admitted merely because of a minor breach of procedural rules which the TC is not bound to apply." Having determined that the evidence at issue was relevant to the case, the Brđanin TC admitted the evidence. Accordingly, the Chamber endorses the human rights and ICTY jurisprudence which focuses on the balance to be achieved between the seriousness of the violation and the fairness of the trial as a whole.[138]

For instance, the Chamber finds that the provisions of the DRC Constitution cannot apply in the context of admissibility decisions. As TC I has pointed out, "[the ICC St. clearly stipulates that the violation has to impact on international, as opposed to national, standards on human rights. [...] Therefore, evidence obtained in breach of national procedural laws, even though those rules may implement national standards protecting human rights, does not automatically trigger the application of art. 69(7) ICC St."[139]

In his report on the establishment of the ICTY, the UN Secretary-General underlined, as axiomatic, that such standards regarding the rights of the accused be fully respected at all stages of the proceedings.[140] Nevertheless, the international criminal courts and tribunals are not parties to, and therefore are not formally bound by, international human rights treaties nor the jurisprudence developed by international human rights courts and other organs. These are directed to States. Instead, some human rights

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[135] Supra note 105, par. 86

[136] ECHR: Schenk v. Switzerland, Judgment of 12 July 1988, Application no. 10862/84, par. 46. See also Saunders v. United Kingdom, Judgment of 17 December 1996, Application no. 19187/91; Khan v. United Kingdom, Judgment of 12 May 2000, Application no. 35394/97; and Van Mechelen and others v. Netherlands, Judgment of 23 April 1997, Application no. 21363/93. This reasoning was also followed by the IACHR in the Ivcher Bronstein case, Judgment of 6 February 2001. In the same vein, see the Castillo Páez v. Peru, Judgment of 3 November 1997, Loayza Tamayo v. Peru, Judgment of 17 September 1997 and Paniagua v. Guatemala, Judgment of 8 March 1998

[137] Supra note 105, par. 87

[138] Supra note 105, par.88, 89

[139] Supra note 89, par. 58

[140] Report of the Secretary-General pursuant to Paragraph 2 of Security Council resolution 808, par. 106 (1993) available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf

principles are set out in the Statutes and RPEs, and are thus directly applicable in the proceedings.[141]

The ICC St., on the other hand, contains provisions reflecting international human rights law and directs that the Court must apply applicable treaties and the principles and rules of international law as sources of law; additionally, the application and interpretation of the law 'must be consistent with internationally recognized human rights' (art. 21(1)(b)(3) ICC St.).[142] Many commentators claim that the ICC represents a clear improvement in the codification of human rights, sometimes going further than international human rights law.[143]

7. Rights of the accused

The Chamber found that, at the pre-trial stage, the Prosecutor needs to provide not all but only sufficient evidence which allows the Chamber to determine whether there are substantial grounds to believe that the suspect committed each of the crimes charged. Therefore, the Chamber is of the view that the expression "include, but (...) not limited to" does not infringe the rights of the Defence at this stage.[144]

Regulation 52 ICC Reg. states that the document containing the charges referred to in art. 61 ICC St. shall include: (a) The full name of the person and any other relevant identifying information; (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.[145]

7.1 The right to be informed promptly of the nature, cause and content of the charges against him (art. 67(1)(a) ICC St.)

A modification of the legal characterisation of the facts can only be envisioned in respect of the facts and circumstances described in the charges. The limitation of the power to recharacterise facts, which is vested in the TC and was reaffirmed by the AC in Lubanga, ensures perfect compatibility between reg. 55 ICC Reg. and the provisions of art. 74(2) ICC St. on the one hand, and on the other hand the rights of the accused, who pursuant to art. 67(1)(a) ICC St., has the right to "[b]e informed

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[141] Supra note 3, par. 430

[142] See e.g. ICC, AC, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, par. 36–9

[143] Supra note 3, par. 431

[144] Supra note 18, par. 66

[145] Supra note 105, par. 147

promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks."[146]

The ECHR and the IACHR considered that the right to be informed of the nature, cause and content of the charges includes the right of the accused to be informed of the legal characterisation of the facts upon which the charges were initially based.[147] However, in both Courts, the right to be promptly informed does not necessarily imply that the accused was aware or could have foreseen at the commencement of his trial, the new legal characterisation that could be envisaged in the event of the implementation of a recharacterisation procedure. The fact remains that, other than the fundamental right of the Defence to submit observations on the recharacterisation, it is vital to ensure that all facts underpinning the charges whose legal character is modified were clearly set out in the original indictment, from the outset.[148]

7.2 The right of the accused to have adequate time and facilities for the preparation of his defense (art. 67 (1)(b) ICC St.)

Pursuant to reg. 55(2) ICC Reg., as has been recalled, upon noting that the legal characterization of facts may be subject to change, the TC shall give notice to the participants of the change and "give [them] the opportunity to make oral or written submissions". The language of reg. 55 ICC Reg. thus refers to art. 67(1)(b) ICC St., which stipulates that the accused has the right to "adequate time and facilities for the preparation of the defense". The AC has also highlighted the following: "It is to avoid violations of this right that reg. 55(2) and 55(3) ICC Reg. set out several stringent safeguards for the protection of the rights of the accused".[149]

Furthermore, the ECHR has found likewise, ruling in the case of Pélissier and Sassi v. France, that art. 6 of the European Convention on Human Rights had been breached when the legal characterization of the facts was changed without affording the defence the possibility of filing observations.[150] It subsequently confirmed this ruling[151] and reaffirmed this requirement in the case of Mattei v. France[152], which raised a similar issue. [153]

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[146] ICC, TC II, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga Aand Mathieu Ngudjolo Chui, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07-3319-tENG/FRA, par. 21

[147] ECHR, Kamasinski v. Austria, Judgment of 19 December 1989, Application no. 9783/82, par. 79; Pélissier and Sassi v. France, Judgment of 25 March1999, Application no. 25444/94, par. 51; IACHR, Barreto Leiva v. Venezuela, Judgment of 17 November 2009, par.28

[148] ECHR, Pierre Bäckström and Mattias Andersson v. Sweden, Decision on admissibility of 5 September 2006, Application no. 67930/0

[149] Supra note 146, par. 35,36

[150] ECHR, Pélissier and Sassi v. France, Judgment of 25 March1999, Application no. 25444/94, par. 62

[151] ECHR, Dallos v. Hungary, Judgment of 1 March 2001, Application no. 29082/95, par. 52; Sadak et al. v. Turkey (No. 1), Judgment of 17 July 2001, Application nos. 29900/96, 29901/96, 29902/96 and

7.3 The right to be tried without undue delay (art. 67(l)(c) ICC St.)

The right to be tried without undue delay is protected by art. 67(l)(c) ICC St. This right afforded the accused imposes a duty of care on all parties and participants as well as on the Chamber. In relation to the admissibility test for evidence, this provision requires that the Chamber exclude evidence if the time anticipated for its presentation - or subsequent evaluation by the Chamber – is disproportionate to its potential probative value. Thus, even when an item of evidence is not devoid of probative value, the Chamber may still decide to exclude it in order to avoid the trial proceedings being burdened by unlimited amounts of repetitive or unduly time-consuming evidence.[154]

Each Statute provides the accused with the right to be tried without 'undue delay'; a right also reflected in all major human rights instruments (art. 21 ICTY St., art. 20 ICTR St., art. 67 ICC St., art. 14(3) ICCPR). In addition, art. 64(3)(c) ICC St. obliges the TC to: 'confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings'. Nevertheless, the ICTY, the ICTR and already the ICC, are often criticized for excessively long proceedings and many challenges have been launched by accused claiming violations of this right.[155]

All stages of the case, from the time the suspect is informed that the authorities are taking steps towards prosecution until the definitive decision, namely final judgment or dismissal of the proceedings, including appeal, must occur without undue delay, namely that the: reasonableness of the length of the proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. It is necessary among other things to take account of the importance of what is at stake for the applicant in the litigation.[156]

29903/96, par. 57-58; Vesque v. France, Judgment (final) of 3 July 2006, Application no. 3774/02, par. 42-43; Drassich v. Italy, Judgment of 11 December 2007, Application no. 25575/04, par. 41-42; See also IACHR, Fermín Ramírez v. Guatemala, Merits, Reparations and Costs, Series C, No. 126, 20 June 2005

[152] ECHR, Mattei v. France, no. 34043/02, Judgment, 19 December 2006, par. 42-43

[153] Supra note 146, par. 37

[154] Supra note 89, par. 41

[155] Supra note 3, p. 435

[156] ICC, TC II, Minority Opinion of Judge Christine Van den Wyngaert, Situation en République Démocratique du Congo Affaire le Procureur v. Germain Katanga, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436-AnxI, par. 121; See, ECtHR, Philis v. Greece (No. 2), Judgment of 27 June 1997, Application no. 19773/92, par. 35. See also Rajak v. Croatia, Judgment of 28 June 2001, Application no. 49706/99, par. 39; Thlimmenos v. Greece, Judgment of 6 April 2000, Application no. 34369/97, par. 60, 62

The ICTR has similarly assessed (a) the length of delay; (b) the complexity of proceedings (the number of counts, number of accused, number of witnesses, quantity of evidence, complexity of facts and the law); (c) the conduct of the parties; (d) the conduct of the authorities involved; and (e) any prejudice to the accused.[157]

A key criterion for measuring whether a delay is reasonable is whether the delay could have reasonably been avoided. Activating regulation 55 does not stop the clock for reasonable delay. More importantly, the focus for reasonable delay should not be on how much work a Chamber has had but on how efficiently the proceedings have been conducted.[158]

Ruling on the legality of reg. 55 ICC Reg., the AC stated that a change in the legal characterization of the facts would not necessarily lead to an undue delay under art. 67(1)(c) ICC St.; it further stated that the specific circumstances of the case would have to be examined. In this connection, it is common in international criminal law to refer to the complexity of the case,[159] which might comprise factual or legal issues.[160] For instance, in Bagosora, the ICTR AC held that a ten-month prolongation as a result of the appeal did not amount to an undue delay.[161] It follows that situations must be examined on a case-by-case basis, and according to the case law of the ECHR, an undue delay in criminal proceedings can be compensated for by, for example, reducing the sentence.[162] In fact, the TC is free to take account of the potential impact on the rights of the accused of triggering certain procedures and to assess whether any compensatory measures are warranted.[163]

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[157] ICTR, TC, Prosecutor v. Bizimungu et al., Judgment and Sentence, Case no. ICTR-00-56, 17 May 2011, par. 73, (citing ICTR, AC, Prosecutor v. Nahimana et al., Appeal Judgement, Case no. ICTR-99-52, 28 November 2007, par. 1074 and ICTR, AC, Prosecutor v. Prosper Mugiraneza, "Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief", Case no. ICTR-99-50, 27 February 2004, par. 3

[158] Supra note 156, par. 125,126

[159] ICTR, AC, Prosecutor v. Karemera et al., Decision on Nzirorera's interlocutory appeal concerning his right to be present at trial, Case no. ICTR-98-44, 5 October 2007, par. 15

[160] ECHR Lorenzi, Bernardini and Gritti v. Italy, Judgment of 27 February 1992, Application no. 13301/87, par. 16; Katte Klitsche de la Grange v. Italy, Judgment of 27 October 1994, Application no. 12539/86, par. 55

[161] ICTR, AC, Prosecutor v. Théonestre Bagosora et al., Decision on Aloys Ntabakuze's motion for severance, retention of the briefing schedule and judicial bar to the untimely filing of the Prosecution's response brief, Case no. ICTR-98-41, 24 July 2009, par. 29

[162] ECHR, Cocchiarella v. Italy, Judgment of 29 March 2006, Application no. 64886/01, par. 77; Eckle v. Germany, Judgment of 15 July 1982, Application no. 8130/78; N. v. Federal Republic of Germany, Judgment of 16 December 1982, Application no. 9132/80, par. 7

[163] Supra note 146, par. 43

7.4 The right to examine, or have examined, adverse witnesses (art. 67(l)(e) ICC St.)

The right of the accused to examine, or have examined, adverse witnesses is of fundamental importance to the fairness of the proceedings. No judgment can be rendered safely if it is based on evidence prepared on behalf of one party which the opponent has not been able to test or verify. This is particularly true for testimonial evidence.[164]

In particular, art. 69(2) ICC St. provides that, in principle, "the testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in art. 68 ICC St. or in ICC RPE". A number of alternative means of obtaining witness testimony, including prior recorded testimony, are mentioned in that paragraph, but it is clearly stated that such measures are only allowed if they are not prejudicial to or inconsistent with the rights of the accused. The crucial right of the defence referred to here is the right mentioned in art. 67(l)(e) ICC St. "to examine, or have examined, the witnesses against him or her". Therefore, if any exceptions are made to the principle that witnesses shall give their testimony in person at trial, this must be done with full respect of the accused's right to be afforded an opportunity to examine (or have examined) those witnesses.[165]

The Chamber emphasises that the right to examine, or to have examined, adverse witnesses only applies to testimony. Not every communication of information by an individual is testimony in this sense. Only when a person acts as a witness against the accused do the latter obtain the right to examine, or have examined, that person. Clearly, statements made out of Court can equally qualify as testimony. This is apparent from the wording of art. 56(l)(a) ICC St., which refers to a "unique opportunity to take testimony" and of art. 93(l)(b) ICC St., which expressly mentions the taking of evidence, "including testimony under oath" in the context of assistance provided by States Parties "in relation to investigations or prosecutions". Moreover, a narrow interpretation of the word "testimony" in art. 67(l)(e) ICC St. would entirely undermine the very right protected by this article and deprive r. 68 ICC RPE of any meaning. It is important, therefore, to distinguish between out-of-court statements that qualify as prior recorded testimony under r. 68 ICC RPE and those that do not.[166]

It is not possible to provide an exhaustive definition of what types of out-of-court statements qualify as testimony. Such a determination must be made on a case-by-case basis, taking into consideration the precise circumstances under which the out-of-

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[164] Supra note 89, par. 42
[165] Supra note 89, par. 43
[166] Supra note 89, par. 44, 45

court statement was given. The following criteria can, therefore, only serve as guidelines and are not intended to create fixed categories.[167]

The first key factor is whether the out-of-court statement was given to a person or body authorised to collect evidence for use in judicial proceedings. The most common example is when a person gives a statement to a representative of the OTP. However, statements given to other entities acting at the behest of the Court can also qualify as witness testimony. As arts. 54(2), 93(l)(b) ICC St. make clear, the Prosecutor may rely on international cooperation in conducting his investigations, including for the taking of pre-trial testimony. Statements given in the context of purely domestic proceedings can also be considered as testimony for the purposes of art. 67(l)(e) ICC St.and r. 68 ICC RPE when they are later transmitted to the Court.[168]

Thus, in principle, statements given to private persons or entities will not be considered as testimony unless there are exceptional reasons for doing so. By contrast, a statement given to representatives of an intergovernmental organisation with a specific fact-finding mandate may be considered as testimony if the manner in which the statement was obtained left no doubt that the information might be used in future legal proceedings. The Chamber observes, in this regard, that, generally speaking, analytical reports based on the personal stories of several individuals are not to be considered as testimony. In the Chamber's view, even if the factual allegations contained in the report are based exclusively on a combined analysis of statements made by identified individuals, the allegations contained in the report are not those of the individual persons but the conclusions drawn from their statements by the author of the report.[169]

The second key factor in determining whether an out-of-court statement qualifies as testimony in the sense of art. 67(l)(e) ICC St. and r. 68 ICC RPE is that the person making the statement understands, when making the statement, that he or she is providing information which may be relied upon in the context of legal proceedings. It is not necessary for the witness to know against whom his or her testimony may be used, or even for the witness to know which particular crime is being investigated or prosecuted. It is important, however, that the statement is formalised in some manner and that the person making the statement asserts that it is truthful and based on personal knowledge. A unilaterally prepared affidavit may thus also qualify as testimony if the person making it clearly had the intention of rnaking factual assertions for the purpose of future or ongoing legal proceedings.[170]

Once the Chamber has determined that an out-of-court statement is testimonial, that statement can only be allowed into evidence under the conditions provided in r. 68 ICC RPE. Therefore, unless the accused persons have either waived their right to

[167] Supra note 89, par. 46
[168] Supra note 89, par. 47
[169] Supra note 89, par. 48
[170] Supra note 89, par. 49

examine the witness or had the opportunity to do so when the testimony was recorded, the statement will not be admitted unless the witness is available for examination at trial.[171]

7.5 Fair trial

A fundamental element of a fair trial, and a general principle of law, is the principle of equality of arms; a principle that should not be confused with the principle of equality before the law, or non-discrimination (art. 20(1) ICTY St., art. 20(1) ICTR St., art. 67(1) ICC St., arts. 14(1), 26 ICCPR).[172] Equality of arms is more significant in adversarial proceedings and requires opportunities for each party to prepare and present its case, both on law and on facts, and to respond to the opponent's case. A judicial body must ensure that neither party is put at a disadvantage when presenting its case but the application is less far-reaching with respect to preparations. The accused's right to have adequate time and facilities to prepare the defence should be ensured under conditions that do not place him or her at a substantial disadvantage vis-à-vis the Prosecutor. Other aspects of the equality of arms are the accused's rights to prompt and detailed information about the charges, to disclosure of and access to the Prosecutor's evidence, to defence counsel, to examine witnesses against him or her, and to call witnesses under equal conditions. [173]

All human rights treaties require an institutional guarantee in the form of an independent and impartial tribunal or court established by law. This is an integral part of the accused's right to a fair trial and a general principle of law recognized by all legal systems of the world. Independence requires an institutional and functional separation from the executive and legislative powers as well as from the parties.[174] One problem for the international criminal jurisdictions is their dependence on cooperation by States and others. The difficulties were described in the Barayagwiza case, after suspension by the government of Rwanda of cooperation with the ICTR, though well aware of the fact that most of the evidence that the Tribunal needed was located in Rwanda.[175] The impartiality requirement also relates to the judge who must be both personally and institutionally impartial.[176]

8. Discretionary power of the Chamber and its limitations

The ICC St. vests all Chambers, regardless of the stage of proceedings, with discretion to freely assess the evidence presented by the parties. Pursuant to art. 69(4)

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[171] Supra note 89, par. 50

[172] See Stefania Negri, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure', International Criminal Law Review 5, 2005, p. 513-571

[173] Supra note 3, par. 435

[174] E.g. ECtHR, Ringeisen v. Austria, Judgment, 16 July 1971, Application no. 2614/65, par. 95

[175] ICTR, AC, Prosecutorv. Barayagwiza, Decision, Case no. ICTR-97-19, 3 November 1999 (particularly the separate opinions by Judges Vohrah and Nieto-Navia)

[176] Supra note 3, par. 431

ICC St., the Chamber has discretion to "rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the ICC RPE."[177]

Furthermore, the general provisions relating to evidence are encapsulated in r. 63 under Chapter 4 of the ICC RPE, under the heading "Provisions relating to the various stages of the proceedings". Rule 63(1) ICC RPE states that "the rules of evidence set forth in this chapter, together with art. 69 ICC St., shall apply in proceedings before all Chambers", thus including a PTC when dealing with confirmation of charges proceedings. In addition, pursuant to r. 63(2) ICC RPE, the Chamber has a broad discretion to freely assess all the evidence submitted where it inter alia held that "evidence is relevant only if it has probative value. Probative value is the weight to be given to a piece of evidence, and weight constitutes the qualitative assessment of the evidence" and recalled that "r. 63(2) ICC RPE providing for its broad discretion to freely assess all the evidence submitted" and underlined that such discretion is, in accordance with art. 69(4)(7) ICC St., "limited by the relevance, probative value, and admissibility of each piece of evidence."[178]

However, this broad discretion of the Chamber should not be exercised arbitrarily or without limitations. Consequently, in accordance with art. 69(4) (7) ICC St., the Chamber's discretion is limited by the relevance, probative value, and admissibility of each piece of evidence.[179]

As the Chamber has previously stated, under art. 69(4) ICC St. the Chamber may exercise its discretion when determining the relevance and/or admissibility of any item of evidence. Probative value is one of the factors to be taken into consideration when assessing the admissibility of a piece of evidence. In the view of the Chamber, this means that the Chamber must look at the intrinsic coherence of any item of evidence, and to declare inadmissible those items of evidence of which probative value is deemed prima facie absent after such an analysis. Any other assessment of the probative value of any given item of evidence will be made in light of the whole body of evidence introduced at the confirmation hearing.[180]

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[177] ICC, PTC I, Situation in Darfur, Sudan in the case of the Prosecutor v. Baharidriss Abu Garda, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, par. 6

[178] ICC, PTC I, Situation in Darfur, Sudan in the case of the Prosecutor v. Baharidriss Abu Garda, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, par. 7; Supra note 18, par. 61

[179] Supra note 18, par. 62

[180] Supra note 30, par. 77

Under art. 69(4) ICC St., it has the discretion to rule on the admissibility and probative value of any item included in the parties Lists of Evidence, in accordance with internationally recognised human rights as provided for in art. 21(3) ICC St.[181]

Although the evidence evaluated for the purposes of the Decision is "the material that has been tendered into evidence for the purposes of the confirmation hearing further to disclosure between the parties and its communication to the Chamber pursuant to r. 121(3) ICC RPE, the citations in the Chamber's conclusion will not include references to all evidence presented in respect of the specific charge. Therefore, the evidence referred to in the Decision is "for the purpose of providing the underlying reasoning for the findings of the Chamber, without prejudice to additional items of evidence that could also support the same the findings". [182]

The drafters of the ICC St. framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited - at the outset - the ability of the Chamber to assess evidence "freely". Instead, the Chamber is authorized by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. In ruling on admissibility the Chamber will frequently need to weigh the competing prejudicial and probative potential of the evidence in question. It is of particular note that r. 63(5) ICC RPE mandates the Chamber not to "apply national laws governing evidence". For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the Court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling - for credible reasons - to give evidence.[183]

Bearing in mind those key considerations, when the admissibility of evidence other than direct oral testimony is challenged the approach should be as follows. First, the Chamber must ensure that the evidence is prima facie relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims. Second, the Chamber must assess whether the evidence has, on a prima facie basis, probative value. In this regard there are innumerable factors which may be relevant to this evaluation, some of which, as set out above, have been identified by the ICTY. The AC in Aleksovski stated that the

[181] Supra note 105, par. 110

[182] ICC, PTC I, Situation in Darfur, Sudan in the case of the Prosecutor v. Baharidriss Abu Garda, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, par. 23

[183] Supra note 91, par. 24

indicia of reliability include whether the evidence is "voluntary, truthful and trustworthy, as appropriate; and for this purpose [the TC] may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant...". Third, the Chamber must, where relevant, weigh the probative value of the evidence against its prejudicial effect. Whilst it is trite to observe that all evidence that tends to incriminate the accused is also "prejudicial" to him, the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case.[184]

[184] Supra note 91, par. 26-28, 31

CHAPTER II: APPROACH TO INDIRECT EVIDENCE

1. Cooperation system for the collection of evidence

The ICC is an independent and autonomous intergovernmental organization with international legal personality and powers to request cooperation from the States Parties (art. 4 and Part 9 ICC St.). The ICC St. explicitly requires these States to 'cooperate fully with the Court' and to ensure that national law allows all specified forms of cooperation (arts. 86 and 88 ICC St).[185] The duty to 'cooperate fully' is explicitly confined to cooperation in accordance with the provisions of the ICC St., which means that the ICC cannot demand cooperation beyond what the ICC St. requires. However, there is a catch-all provision at the end of the list of measures for assistance other than arrest and surrender (art. 93(1)(l) ICC St.). States may also provide additional cooperation voluntarily. Some grounds for refusal are explicitly laid down in the ICC St. There may be additional obligations to cooperate in other agreements, including those concluded by the Court with individual States to enhance cooperation (art. 54(3)(d) ICC St. and reg. 107 ICC Reg.) [186]

The ICC is the creation of all States Parties and acceptance of even stricter obligations to cooperate than with respect to the Tribunals could therefore be expected. But in fact the opposite is true. The general duty to cooperate set out in the ICTY and ICTR Statutes (art. 29 ICTY St. and art. 28 ICTR St., which derive their authority from SC Res. 827 (1993) and 955(1994)) is binding on all UN Member States by virtue of Chapter VII of the UN Charter and it contains no qualifications or exceptions: a truly vertical scheme. The State-negotiated ICC scheme, on the other hand, also contains a duty to cooperate but it is in some respects closer to inter-State cooperation. In particular, the regime is based on requests instead of orders, certain grounds for postponement or refusal exist, and the scope for on-site investigations and compelling individuals to give evidence is limited.[187]

At the ICC, States are given an even greater scope for intervention which is partly due to the principle of complementarity (arts. 18–19 ICC St.). A referring State may request a review of the Prosecutor's decision not to investigate or to prosecute (art. 53(3) ICC St). Certain decisions may be appealed by an affected State (art. 82(1)(d)(2) ICC St) and States may also seek a ruling on the legality of a request for cooperation and intervene in procedures regarding a failure to cooperate (regs. 108–9 ICC Reg.). Additionally, the Chambers of both the Tribunals and the ICC may allow

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[185] See, Claus Kreß, 'Penalties, Enforcement and Cooperation in the International Criminal Court', European Journal of Crime, Criminal Law and Criminal Justice, 1998 (6), p. 442 at 450

[186] Supra note 3, p. 511; See Report of the International Criminal Court for 2005–2006 (UN Doc. A/61/217 of 3.8.2006) par. 52–6

[187] Supra note 3, p. 510; See Hans-Peter Kaul and Claus Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', Yearbook of International Humanitarian Law, 1999 (2), p. 143 at 158–61

States, organizations or individuals to make amicus curiae (friend of the court) submissions on legal or other issues (r. 74 ICTY RPE and ICTR RPE and r. 103 ICC RPE). [188]

The explicit duty to cooperate set out in the ICC St. is confined to States Parties, but special provisions authorize the Court to invite non-States Parties to cooperate in accordance with separate arrangements (art. 87(5) ICC St.). In addition, non-States Parties which accept the jurisdiction of the ICC in individual cases must also cooperate with the Court in accordance with Part 9 ICC St. (art. 12(3) ICC St.). Finally, the Security Council may, when referring a situation to the ICC, require that UN Member States cooperate with the Court, regardless of whether those States are parties to the ICC St. or not. This was done with respect to Sudan (Darfur). Quite apart from this, it has been argued that there may be a customary law duty to ensure compliance with international humanitarian law, which in turn could translate into a duty to cooperate with the ICC in a given case, although such an argument has by no means been universally accepted.[189]

The investigation includes the questioning of individuals (suspects, victims, witnesses, experts and others) and the collection of written and other material. In some cases, extensive and resource-intense exhumation of mass graves and other forensic measures are required. Without an international police force to carry out the investigation and to enforce court orders, the investigation depends very much on the cooperation of States and other entities such as peace-keeping forces, international military or police forces. The Prosecutor is entitled to seek cooperation from States and others in the investigation. (art. 54(2)(c) ICC St., as well as provisions in the respective ICC RPE). [190] The defence may by this means seek a request for cooperation by a State and arguably, at least in the ICC an order directed to the Prosecutor regarding specific investigative measures.[191]

The successful operation of these institutions is completely dependent upon international cooperation. They may not and cannot themselves implement their decisions, such as an arrest warrant, on the territory of a State, and they do not have their own police force. Cooperation is therefore at the heart of effective international criminal proceedings, but this dependence has led to many difficulties in practice.[192]

[188] Supra note 3, p. 441
[189] Supra note 3, p. 515; Zhu Wenqi, ‘On Cooperation by States Not Party to the International Criminal Court’, International Review of the Red Cross, 2006, p. 87
[190] Supra note 2
[191] Supra note 3, p. 446
[192] Supra note 3, p. 509; See Mark Harmon and Fergal Gaynor, ‘Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings’, Journal for International Criminal Justice, 2004(2), p. 403, and Yolanda Gamarra and Alejandra Vicente, ‘United Nations Member States’ Obligations Towards the ICTY: Arresting and Transferring Lukic´ , Gotovina and Zelenenovic´ ’, International Criminal Law Review, 2008 (8), p. 627

The cooperation of entities other than States has proved indispensable in practice. International forces (IFOR) have carried out most of the arrests for the ICTY. Arrest warrants have sometimes been issued directly to non-State entities instead of States.[193] The UN peacekeeping forces in the Democratic Republic of Congo (MONUC) was given an explicit mandate to cooperate with international efforts to bring perpetrators to justice. [194] In Sudan, on the contrary, any links between the ICC and the international peacekeeping mission (UNAMID) have been avoided and UNAMID's mandate contains no reference to international criminal investigations or prosecutions.[195]

The ICC applies the same scheme to intergovernmental organizations as to non-States Parties and cooperation thus depends on a voluntary commitment (αrt. 87(6) ICC St.). For example, a cooperation agreement has been concluded with the European Union.[196] A special relationship exists between the ICC and the United Nations and matters having an impact on cooperation are addressed in a Relationship Agreement.[197] The difficult issue is how to deal with confidentiality: One organization, the ICRC, has been granted special treatment, motivated by the special status drawn from its mandate under the Geneva Conventions. The ICC has followed suit with an absolute privilege provision (r. 73(4) ICC RPE). The ICRC may thus prevent disclosure of information or testimonies by present and past ICRC officials or employees.[198]

Quite apart from the fact that the resources are limited, international investigations and prosecutions are very complex, factually, legally and politically, and therefore more time-consuming than most domestic ones.[199] The dependence upon cooperation by States and others has led to the metaphorical description as a 'giant without arms

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[193] See, e.g. ICTY, TC II, Prosecutor v. Dokmanovic´, Decision on the Motion for Release by the Accused Slavko Dokmanovic, Case no. IT-95-13a, 22 October 1997, par. 3 (arrest warrant issued to the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium, UNTAES

[194] SC Res. 1565 of 1.10.2004 available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/SE%20SRES%201565.pdf and SC Res. 1856 of 22.12.2008 available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRS%20SRES%201856.pdf ; see Memorandum of Understanding between the UN and the ICC Concerning Co-operation between MONUC and the ICC (8.11.2005)

[195] SC Res. 1769 of 31.7.2007 available at http://unamid.unmissions.org/Portals/UNAMID/UNSC%20Resolution%201769%20%282007%29.pdf ; the earlier African Union mission (AMIS) also had no mandate to cooperate with the ICC

[196] Agreement between the International Criminal Court and the European Union on Cooperation and Assistance of 10.4.2006 (ICC-PRES/01–01–06)

[197] Art. 2 of the ICC Statute and the Relationship Agreement between the International Criminal Court and the United Nations of 4.10.2004 (ICC-ASP/3/Res.1)

[198] Supra note 3, p. 517

[199] Supra note 3, p. 436

or legs'.[200] The distinction between 'horizontal' and 'vertical' cooperation schemes depicts a fundamental difference in approach; the 'vertical' model attributes greater powers to the international jurisdiction and imposes greater duties on the States. The scheme of the tribunals is more 'vertical' than that of the ICC and the latter is weaker on issues such as arrest by peacekeeping forces, investigations on site and powers to bring witnesses before the Court.[201]

It operates in conflicts which are still ongoing and this complicates all forms of cooperation. Moreover, the ICC's activities, and hence the need for cooperation, will in many cases occur when the State most concerned is unwilling or unable to take appropriate action itself; a paradoxical effect of the complementarity principle. How could one then expect any constructive assistance from that State? The refusal to cooperate with respect to Darfur by the Sudanese Government, concerning both the investigations and the surrender of suspects, is a telling example. The ICC cooperation regime may be strengthened and improved over time, but it is unrealistic to expect that the indirect model for enforcement will be replaced and it will therefore remain the weakest link of the Court's procedural framework. [202]

2. **Indirect evidence**

With respect to the admissibility of evidence, neither the ICC St. nor the ICC RPE provides that a certain type of evidence is per se inadmissible. Depending on the circumstances, the Chamber is vested with discretion or statutorily mandated to rule on the admissibility of the evidence. On the one hand, the Chamber may, pursuant to art. 69(4) ICC St., "rule on the [...] admissibility of any evidence". On the other hand, the Chamber shall, pursuant to art. 69(7) ICC St. and r. 63(3) ICC RPE, rule on the admissibility of the evidence on an application of a party or on its own motion, if grounds for inadmissibility appear to exist.[203]

The Chamber identifies the evidence either as direct or indirect, the latter encompassing hearsay evidence, reports of international (UN) and non-governmental organizations (NGOs), as well as reports from national agencies, domestic intelligence services and the media. Pursuant to r. 76 ICC RPE, evidence may also be oral, in particular when it is rendered by witnesses called to testify or written, such as copies of witness statements or material covered by r. 77 ICC RPE, such as books, documents emanating from various sources, photographs, and other tangible objects, including but not limited to video and/or audio recorded evidence.[204]

In Muthaura case, the accused agreed with the Chamber's finding that NGO reports are indirect evidence, but he argues that the Majority erred by using NGO reports as

[200] Cassese Antonio, On Current Trends Towards the Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, European Journal of International Law,1998 (9), p. 2-17

[201] Supra note 3, p. 528

[202] Supra note 3, p. 529

[203] Supra note 33, par. 76

[204] Supra note 33, par. 82; Supra note 18, par. 47

corroboration for other NGO reports. Against this backdrop, Muthaura seek leave to appeal "the legal question of relying on indirect evidence to corroborate other indirect evidence". According to Muthaura, this issue affects the fairness of the proceedings due to the "unreliable and untested" nature of indirect evidence and because such evidence may not be available at trial.[205] Muthaura's arguments were grounded upon a misrepresentation and the erroneous assumption that indirect evidence is – by definition – unreliable, and its reliability cannot be bolstered by other indirect evidence. The Majority stated that it assessed the relevance and probative value of indirect evidence and that probative value was determined in light of the totality of the evidence. The Majority evaluated NGO reports in the context of other evidence offered to prove or disprove a given factual proposition; through this process, the Chamber determined the reliability and probative value of each piece of evidence.[206]

It is equally wrong to presume that, ab initio, all indirect evidence is unreliable. "Indirect" is just another way of identifying evidence as hearsay or circumstantial evidence. Neither category is presumptively excludable on reliability grounds. [207]

In considering indirect evidence, the Chamber follows a two-step approach. First, as with direct evidence, it assesses its relevance and probative value. Second, it verifies whether corroborating evidence exists, regardless of its type or source. The Chamber is aware of r. 63(4) ICCRPE, but finds that more than one piece of indirect evidence, which has low probative value, is preferable to prove an allegation to the standard of substantial grounds to believe. In light of this assessment, the Chamber then determines whether the piece of indirect evidence in question, when viewed within the totality of evidence, is to be accorded a sufficient probative value to substantiate a finding of the Chamber for the purposes of the decision on the confirmation of charges.[208]

As a general rule, a lower probative value will be attached to indirect evidence than to direct evidence. The Chamber does not disregard it, but is cautious in using it to support its findings. The Chamber highlights that, although indirect evidence is commonly accepted in jurisprudence, the decision of the Chamber on the confirmation of charges cannot be solely based on one such piece of evidence.[209]

In sum, this approach enables the Chamber to make its determination pursuant to art. 61(7) ICC St. even if the evidence as a whole relating to one charge lacks direct evidence and is only supported by pieces of indirect evidence, provided that their probative value allows the Chamber to determine that the threshold established in that article is met.[210]

[205] Supra note 17, par. 46
[206] Supra note 17, par. 47
[207] Supra note 17,par. 48
[208] Supra note 33, par. 87; Supra note 17, par. 45; Supra note 18, par. 52
[209] Supra note 18, par. 51; Supra note 33, par. 86; Supra note 25, par. 28
[210] Supra note 18, par. 54

The PTC II in Situation in the CAR in the case of the Prosecutor v. Jean-Pierre Bemba Gombo was based on the following indirect evidence which showed that the attack was directed against the CAR civilian population: radio broadcast, the United Nations Development Program (UNDP) project, United Nations Resident Coordinator (UNRC) weekly reports, AI and Fédération Internationale des ligues des droits de l'homme (FIDH) reports, British Broadcasting Corporation (BBC) press articles, press articles of "Le Quotidien" and "Jeune Afrique" and Radio France International (RFI) radio broadcasts. It also relied on indirect evidence establishing that the attack of CAR civilians in Boy-Rabé, PK 12, PK 22 and Mongoumba was perpetrated by MLC troops in the period from on or about 26 October 2002 until 15 March 2003: AI report: "Central African Republic, Five months of war against women", RFI broadcast reporting, FIDH report: "Central African Republic, Forgotten, stigmatized: the double suffering of victims of international crimes". Indirect evidence of the widespread nature of the crimes committed includes hearsay evidence, such as that provided in reports by the UN, the Fédération Internationale des ligues des droits de l'homme (FIDH), AI, Organisation pour la Compassion et le Développement des Familles en Détresse (OCODEFAD) and various media sources including the BBC, Jeune Afrique (JA) press articles and several extracts of Radio France Internationale (RFI) programmes, broadcasted at different dates during the alleged five-month attack.[211]

In addition to direct evidence, the Chamber took note that indirect evidence, such as hearsay evidence and several NGO[212] and UN reports[213] were of a corroborating nature.[214]

Dealing with the difficulty of on-site investigations in Lubanga case, the OTP came up with two main solutions. First, it relied on the investigations carried out by the MONUC, the UN mission charged with documenting violations of human rights in the eastern part of the DRC,[215] as well as local and international NGOs working in the

[211] Supra note 18, par. 94, 101, 123

[212] AI report: "Central African Republic, Five months of war against women", AI reports of an international medical charity, summaries of testimonies of rape victims, information on 300 reported complaints of rape by CAR civilians, FIDH report: "Crimes de Guerre en République Centrafricaine Quand les éléphants se battent, c'est l'herbe qui souffre'' (in this report FIDH provides information with reference to an NGO in the field that 79 women have been victims of sexual violence. In its report of October 2006 "République Centrafricaine, Oubliées, stigmatisées: la double peine des victimes de crimes internationaux"). FIDH provides further testimonies of civilians who have been victims of rape by MLC soldiers which it collected during its fact-findings missions in the CAR, an FIDH press release

[213] UNRC: "Central African Republic Weekly Humanitarian Update". It is reported that the UNDP project had identified 248 women and girls that fell victim to rape and other forms of physical violence and humiliations in the hands of the MLC troops. AI confirms that the UNDP project started on 28 November 2002 with the aim to provide emergency medical care to survivors of rape, AI report:"Central African Republic, Five months of war against women"

[214] Supra note 18, par. 186

[215] The SCl mandate of MONUC includes a human rights component, and MONUC teams have on several occasions investigated allegations of specific violations. See Secretary-General, Thirteenth

region. Not only was this considered a safer method with regard to witness protection, but it also saved the Prosecutor resources.[216] Second, it employed local persons as liaison officers between the investigators and the local communities referred to as intermediaries. These intermediaries were relied upon to facilitate contact with potential witnesses, as well as to collect security information regarding the region.[217]

As in Lubanga, in Katanga and Ngudjolo case the prosecution relied on the work product of MONUC and NGOs. Similar problems as in Lubanga arose with regard to the excessive use by the OTP of its power to enter into confidentiality agreements.[218] By the time the trial started, as in Lubanga, the UN had agreed to allow the Chamber to review the documents that were marked as potentially exonerating, and most of the documents were subsequently disclosed to the Defense.[219]

In Mbarushimana case also for the purpose of the confirmation hearing, the OTP relied on NGO and UN reports, often one single report in relation to each attack

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Report of the Secretary-General on MONUC, U.N. Doc. S/2003/211 (Feb. 21, 2003) available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/249/65/IMG/N0324965.pdf?OpenElement

[216] Julie Flint & Alex de Waal, Case Closed: A Prosecutor Without Borders, World Affairs, Spring 2009; See also Elena Baylis, Outsourcing Investigations UCLA Journal of International Law and Foreign Affairs, volume 14, 2009, p. 143–44

[217] ICC, TC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v .Thomas Lubanga Dyilo, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", ICC-01/04-01/06-2690-Red2, par. 126 (citing ICC, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v .Thomas Lubanga Dyilo, Prosecution's Response to the Defence's "Requête de la Défense aux Fins D'arrêt Définitif des Procedures", ICC-01/04-01/06-2678-Conf, par.18

[218] ICC, PTC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the 19 June 2008 Prosecution Information and Other Matters Concerning Articles 54 (3)(e) and 67 (2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-646, par. 1-8, 10, 20-23; ICC, PTC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, ICC-01/04-01/07-621, par. 1–64; ICC, PTC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Public Prosecution's Report on the Status of the Procedures Initiated Under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature Under Article 67(2) of the Statute, ICC-01/04-01/07-77, par. 1

[219] ICC, TC II, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Second Decision on Documents Obtained Pursuant to Article 54(3)(e) and Already Disclosed to the Defence in Redacted Form, ICC-01/04-01/07-1661-Red2-tENG ; ICC, TC II, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Reasons for the Oral Decision of 3 February 2009 on the Procedure for the Redaction of Documents Obtained by the Prosecutor Under Article 54(3)(e) of the Statute and Order Instructing the Prosecutor to Submit Documents to the Chamber, ICC-01/04-01/07-931-tENG; ICC, TC II, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Order Instructing the Prosecutor to Provide Additional Details About Certain Disclosure Notes, Inspection Reports and the Report Dated 5 January 2009 (Regulation 28 of the Regulations of the Court), ICC-01/04- 01/07-839-tENG

charged.[220] Deficient investigations were partly the reason that the PTC did not confirm the case against Mbarushimana. The Chamber noted “the paucity of the information” in the reports, “inconsistencies between the information [in the reports] and the Prosecution's allegations,” and “the lack of any independent corroborating evidence.” The PTC similarly found that numerous other attacks were not proven on the “sufficient grounds to believe” standard because they were not substantiated other than by assumptions or information from third parties.[221]

Up until the confirmation of charges hearing, the Kenyan investigations relied primarily on the investigations carried out by the Commission of Inquiry into the Post-Election Violence an initiative funded jointly by the Kenyan government and the multi-donor Trust Fund for National Dialogue and Reconciliation. The Waki Commission was tasked with investigating the violence that erupted in Kenya following the disputed presidential election held in December 2007. In addition, the OTP benefited from detailed reports compiled by the Kenyan National Commission on Human Rights (KNCHR), as well as by other human rights organizations such as Human Rights Watch (HRW).[222] The Prosecutor indicated that, now that the charges were confirmed, the prosecution would need to move into Kenya to investigate the crime base and engage with the victims.[223]

Similar arguments of incomplete investigations were made during the Abu Garda confirmation proceedings. The PTC in Abu Garda and by majority in Kenya I and II have taken the position that investigative failures cannot, by themselves, be a ground to decline to confirm the charges, but “may have an impact on the Chamber’s assessment of whether the Prosecutor's evidence as a whole has met the ‘substantial grounds to believe’ threshold.”[224]In Kenya I and II, dissenting Judge Kaul expressed his disagreement with the majority ruling that this issue does not fall within the scope of the confirmation hearing. He pointed out art. 54 ICC St. required of the Prosecution investigations to cover all incriminating and exonerating facts and evidence. In his view, these requirements are fundamental and must be respected at the confirmation

[220] ICC, PTC I, Prosecutor v. Callixte Mbarushimana, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, par. 117–18, 120

[221] ICC, PTC I, Situation in the Democratic Republic of the Congo in the case of Prosecutor v. Callixte Mbarushimana, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, par. 113-136

[222] HRW Report, Ballots to Bullets: Organized Politicalviolence And Kenya’s Crisis Of Government, Mar. 2008(20), available at http://www.hrw.org/reports/2008/kenya0308/kenya0308web.pdf ; See, e.g., ICC, PTC II, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, William Samoei Ruto Defence Brief Following the Confirmation of Charges Hearing, ICC-01/09-01/11-355, par. 28–29

[223] Press Conference held by Luis Moreno-Ocampo on January 24, 2012 relating to the PTC’s decision on the confirmation of the charges in Kenya I and II, issued on January 23, 2012, available at http://www.youtube.com/watch?v=0-WYkNYXvug&feature=relmfu

[224] Supra note 47, par. 46-48; ICC, PTC II, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, par. 51–52; Supra note 33, par.63–64

stage.[225] Indeed, these failures led in part to the non-confirmation of the cases against Abu Garda and two of the Kenyan defendants (Henry Kiprono Kosgey and Mohammed Hussein Ali). These cases were not confirmed due to insufficient evidence or inherent contradictions and inconsistencies between witness statements.[226]

The OTP has not visit Darfur. It conducted four missions in Khartoum and interviewed two senior officials of the government of Sudan, but did not visit Darfur.[227]Ever since the arrest warrants against these government officials have been issued, the situation in Sudan has reached a level of insecurity which inhibits 'on the ground' investigation. Death threats have been publicly announced against anyone who cooperates with the ICC.[228]This has caused problems in the ongoing post confirmation proceedings against Abdallah Banda and Saleh Jerbo, two opposition rebels. All parties to the proceedings have been refused entrance into the country. As a result, the Defense filed a motion for a temporary stay of proceedings, arguing that a fair trial of the matter was impossible.[229] The Chamber dismissed the defense motion. Whilst accepting the assertion that onsite investigations were impossible, it held that "the ICC St. does not include an absolute and an all-encompassing right by the Prosecution and the Defence to on-site investigations." Accordingly, the Chamber held, it "should not automatically conclude that a trial is unfair, and stay proceedings as a matter of law, in circumstances where States would not allow Defence (or prosecution) investigations in the field even if, as a result, some potentially relevant evidence were to become unavailable." The Chamber rejected Defense arguments on the ground that it had failed to "properly substantiate" its allegation that the lack of access to Sudan rendered impossible the securing of certain lines of Defence and exculpatory evidence. Instead, the Chamber decided that the case should proceed to

[225] ICC, PTC II, Dissenting Opinion of Judge Kaul,Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, Redacted Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-373-Red, par. 50-52; See also Supra note 37, par. 62

[226] See, Supra note 47, par. 173– 236; ICC, PTC II, Dissenting Opinion of Judge Kaul,Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, Redacted Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-373-Red, par. 293– 300; Supra note 37, par. 420–27

[227] See ICC, PTC I, Situation in Darfur, Sudan, Prosecutor's Responses to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, ICC-02/05-16, par. 20

[228] ICC, PTC I, Situation in Darur, the Sudan in the case of the Prosecutor v. Ahmad Harun & Ali Kushayb, "Prosecution Request for a Finding on the Non-Cooperation of the Government of the Sudan in the Case of The Prosecutor v. Ahmad Harun and Ali Kushayb, Pursuant to Article 87 of the Rome Statute", ICC-02/05-01/07-48-Red, par. 33–36 (quoting Sudanese Director of Intelligence, Salah Gosh's, announcement on February 22, 2009 that "anyone who attempts to put up his hands to execute [ICC] plans we will cut off his hands, head and parts because it is a non-negotiable issue")

[229] ICC, TC IV, Situation in the Darfur, Sudan in the case of the Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus, Defence Request for a Temporary Stay of Proceedings, ICC-02/05-03/09-274, par. 18–35, 40–47

trial and that the Defense complaints be dealt with, if need be, during or after the presentation of the evidence.[230] This failure to investigate has led to the Prosecution's reliance on statements of witnesses and informants outside Sudan, as well as third-party evidence, including documents provided by the UN International Commission of Inquiry on Darfur.[231]

2.1 Reports by UN agencies

Insofar as such reports emanate from independent observers who were direct observers of the facts being reported, the Chamber considers them to be prima facie reliable. However, if the author's identity and the sources of the information provided are not revealed with sufficient detail, the Chamber is unable to determine whether the contents of the report have been imparted by an eyewitness or some other reliable source. If such particulars are not available, either from the reports themselves or from their author(s), the Chamber cannot assess the reliability of the content of the reports; it is therefore unable to qualify those documents as sufficiently reliable to be admitted into evidence. Moreover, where such reports are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned.[232]

Second, with respect to the UN reports or NGO documents, the Defence for Mathieu Ngudjolo Chui submitted that the admissibility of this evidence "[was] contingent on a preliminary demonstration concerning the reliability of the methodology used in the compilation of the information contained in the said reports, on account of the inherent nature of such reports."[233]

2.1.1 Negotiated Relationship Agreement between the ICC and the UN (22/07/2004)[234]

The UN and the ICC with a view to facilitating the effective discharge of their respective responsibilities, they cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute (art. 3).

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[230] ICC, TC IV,Situation in Darfur, Sudan in the case of the Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus, Decision on the Defence Request for a Temporary Stay of Proceedings, ICC-02/05-03/09-410

[231] ICC, PTC I, Situation in Darfur, Sudan, Prosecutor's Responses to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, ICC-02/05-16, par. 20

[232] Supra note 89, par. 29

[233] Supra note 30, par. 134

[234] Negotiated Relationship Agreement between the ICC and the UN, 22/07/2004, available at http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf

Concerning the submission of documents and information in particular cases before the Court, the UN and the Court shall, to the fullest extent possible and practicable, arrange for the exchange of information and documents of mutual interest (art. 5(1)). The Agreement rules also on general provisions regarding cooperation between the UN and the Court. With due regard to its responsibilities and competence under the Charter and subject to its rules as defined under the applicable international law, the UN undertakes to cooperate with the Court and to provide to the Court such information or documents as the Court may request pursuant to art. 87(6) ICC St. (art. 15(1)). The UN or its programmes, funds and offices concerned may agree to provide to the Court other forms of cooperation and assistance compatible with the provisions of the UN Charter and the ICC St. (art. 15(2)). In the event that the disclosure of information or documents or the provision of other forms of cooperation would endanger the safety or security of current or former personnel of the UN or otherwise prejudice the security or proper conduct of any operation or activity of the UN, the Court may order, particularly at the request of the UN, appropriate measures of protection. In the absence of such measures, the UN shall endeavour to disclose the information or documents or to provide the requested cooperation, while reserving the right to take its own measures of protection, which may include withholding of some information or documents or their submission in an appropriate form, including the introduction of redactions (art. 15(3)).

With due regard to its responsibilities and competence under the Charter of the UN and subject to its rules, the UN undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under art. 54 ICC St., his or her duties and powers with respect to investigation and seeks the cooperation of the UN in accordance with art. 18(1) of this Agreement. Subject to the rules of the organ concerned, the UN undertakes to cooperate in relation to requests from the Prosecutor in providing such additional information as he or she may seek, in accordance with art. 15(2) ICC St., from organs of the UN in connection with investigations initiated proprio motu by the Prosecutor pursuant to that article (art. 18 (2)). The UN and the Prosecutor may agree that the UN provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the UN (art. 18 (3)). The Prosecutor and the UN or its programmes, funds and offices concerned may enter into such arrangements as may be necessary to facilitate their cooperation for the implementation of this article, in particular in order to ensure the confidentiality of information, the protection of any person, including former or current UN personnel, and the security or proper conduct of any operation or activity of the UN (art.18 (4)).

If the UN is requested by the Court to provide information or documentation in its custody, possession or control which was disclosed to it in confidence by a State or an

intergovernmental, international or non-governmental organization or an individual, the UN shall seek the consent of the originator to disclose that information or documentation or, where appropriate, will inform the Court that it may seek the consent of the originator for the UN to disclose that information or documentation. If the originator is a State Party to the Statute and the UN fails to obtain its consent to disclosure within a reasonable period of time, the UN shall inform the Court accordingly, and the issue of disclosure shall be resolved between the State Party concerned and the Court in accordance with the ICC St.. If the originator is not a State Party to the ICC St. and refuses to consent to disclosure, the UN shall inform the Court that it is unable to provide the requested information or documentation because of a pre-existing obligation of confidentiality to the originator (art. 20).

2.2 Reports by intergovernmental organizations

2.2.1 Security arrangements for the protection of classified information exchanged between the EU and the ICC (15 April 2008)[235]

Subject to the detailed provisions set out below, the Parties ensure that classified information[236] exchanged with the other Party is protected to a level which is at least equivalent to the relevant minimum standards set out in the providing Party's security rules and regulations. The Parties undertake to ensure that security measures implemented by them will: prevent any unauthorised person from having access to classified information or to installations which contain it; and ensure the integrity and confidentiality of all information, whether classified or unclassified. The requesting organ of the ICC may request that any request for information, and any information provided pursuant thereto, is not disclosed to any other organ of the ICC.

2.2.2 Agreement between the ICC and the EU on Cooperation and Assistance (1 May 2006)[237]

Article 87(6) ICC St. provides that the Court may ask any intergovernmental organisation to provide information or documents, and that the Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organisation and which are in accordance with its competence or mandate;

The EU and the Court with a view to facilitating the effective discharge of their respective responsibilities, they cooperate closely, as appropriate, with each other and

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[235]Security arrangements for the protection of classified information exchanged between the EU and the ICC, 15 April 2008, available at http://www.icc-cpi.int/NR/rdonlyres/2F732A87-BBB6-4F57-993A-76D8FFB7463B/282678/SecurityArrangements.pdf

[236] Classified information shall mean any information (namely, knowledge that can be communicated in any form) or material determined to require protection against unauthorised disclosure and which has been so designated by a security classification at http://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf

[237]Agreement between the ICC and the EU on Cooperation and Assistance, 1 May 2006, available at http://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf

consult each other on matters of mutual interest, pursuant to the provisions of this Agreement (art. 4).

The EU and the Court ensure the regular exchange of information and documents of mutual interest in accordance with the ICC St. and ICC RPE (art. 7.1). With due regard to its responsibilities and competence under the EU Treaty, the EU undertakes to cooperate with the Court and to provide the Court with such information or documents in its possession as the Court may request pursuant to art. 87(6) ICC St. (art. 7.2). The EU may, at its own initiative and in accordance with the EU Treaty, provide information or documents, which may be relevant to the work of the Court (art. 7.3).

Should the cooperation, including the disclosure of information or documents, provided for in this Agreement endanger the safety or security of current or former staff of the EU or otherwise prejudice the security or proper conduct of any operation or activity of the EU, the Court may order, particularly at the request of the EU, appropriate measures of protection (art. 8).

While fully respecting the EU Treaty: (i) the EU undertakes to cooperate with the Prosecutor, in accordance with the ICC St. and the ICC RPE, in providing additional information held by the EU that he or she may seek; (ii) to cooperate with the Prosecutor, in accordance with art. 54(3)(c) ICC St.; (iii) in accordance with art. 54(3)(d) ICC St., it shall enter into such arrangements or agreements, not inconsistent with the ICC St., as may be necessary to facilitate the cooperation of the EU with the Prosecutor (art. 11.1). The EU and the Prosecutor may agree that the EU provide the Prosecutor with documents or information on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or third parties, at any stage of the proceedings or thereafter, without the consent of the EU (art. 11.3). The Court and the EU may, for the purposes of implementing this Agreement, enter into such arrangements as may be found appropriate (art. 17.2).

The Court shall ensure that (i) EU classified information released to it keeps the security classification given to it by the EU and shall safeguard such information. (ii) the Court shall not use the released EU classified information for purposes other than those for which those EU classified information and documents have been released to the Court (iii) the Court shall not disclose such information and documents to third parties without the prior written consent of the EU in accordance with the principle of originator consent as defined in the Council's security regulations (iv) the Court shall ensure that access to EU classified information released to it will be authorized only for individuals who have a ″need to know″.

Considering that under art. 87(6) ICC St., the ICC may ask any intergovernmental organization to provide such forms of cooperation and assistance as may be agreed upon with such an organization and which are in accordance with its competence and

mandate. The ICC and GS/OAS are cooperating in matters of common interest including exchange of information and documents.[238] Also, the Court and the Commonwealth have agreed that, with a view to facilitating the effective discharge of their respective responsibilities they shall cooperate closely with each other and consult each other on matters of mutual interest and transmit to the Court information or documents on developments related to the ICC St. which are relevant to the work of the Court.[239] Equally, desiring to make provision for a mutually beneficial relationship and to enhance cooperation and assistance between AALCO and the Court the parties agree that in conformity with their respective constitutive instruments and mandates they shall cooperate with each other on matters of mutual interest pursuant to the provisions of this MoU. Subject to the respective rules and policies of each party regarding confidentiality and disclosure of information the parties shall as appropriate exchange information of mutual interest with each other.[240]

2.3 Reports from independent NGOs and third States

Similarly, reports emanating from independent private organisations or governmental bodies of third States can be considered prima facie reliable if they provide sufficient guarantees of non-partisanship and impartiality. They should further include sufficient information on their sources and the methodology used to compile and analyze the evidence upon which the factual assertions are based. If such particulars are not available, either from the reports themselves or from their author(s), the Chamber cannot assess the reliability of the content of the reports; it is therefore unable to qualify those documents as sufficiently reliable to be admitted into evidence. Moreover, where such reports are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned.[241]

2.4 Intermediaries

An intermediary is someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other. Describing an individual or

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[238] Exchange of Letters Between the International Criminal Court and the General Secretariat of the Organization of American State for the establishment of a Framework Cooperation Arrangement, 18 April 2011, available at http://www.icc-cpi.int/NR/rdonlyres/824CDB02-5EA2-4E1D-ABF4-3F297C1240E9/283263/ExchangeofletterswithOAS.pdf

[239] Memorandum of Understanding between the International Criminal Court and the Commonwealth on Cooperation , 13 July 2011, available at http://www.icc-cpi.int/NR/rdonlyres/F9569B18-0AF3-499E-9352-4D5C91373B31/283598/MOUwithCommonwealthoncooperation13072011.pdf

[240] Memorandum of understanding between the ICC and the Asian African legal consultative organization, 5 February 2008, available at http://www.icc-cpi.int/NR/rdonlyres/10081636-FCFA-448D-9106-6EF62A746C43/0/ICCPres050108ENG.pdf

[241] Supra note 89, par. 30

organization as an intermediary does not necessarily imply that the organ or unit of the Court or Counsel has requested the individual or organization to assist. An intermediary might be chosen by a victim or another person to assist them in making contact with an organ or unit of the Court or Counsel. He or she may also be self-appointed.[242]

In the view of Christian De Vos, "it makes great sense for the OTP to develop contacts with actors on the ground, given constraints on its time and resources."[243] They understand the local culture, language and people, which are opaque to foreign investigators. They ensure that doors open that would otherwise be closed. They are the bridge between the international staff and the local communities and introduce witnesses to the investigators. No one suggests that the involvement of a local person, not officially employed by the ICC, in putting a witness in contact with a party necessarily renders the witness unreliable. This involvement, in itself, is not problematic and may be beneficial. The prosecution is not criticized for using intermediaries per se, but for the extent to and manner in which it did so. Defense teams also use local people in their search for evidence. Every defense team deploys local investigators who have connections in the field that they can use to contact informants or potential witnesses.[244]

The use of intermediaries in Lubanga case appeared to offer a solution to the problems described in investigations. They often have links with NGOs, as well as the UN.[245] They can travel without raising suspicion and have a permanent base in the area.[246] Potential witnesses, selected by intermediaries, can be interviewed in safe locations outside the conflict zone.[247] Eventually, the defense requested a permanent stay of the proceedings, arguing that the evidence was so unreliable that a fair trial could no longer be guaranteed. The Chamber accepted there were grave grounds for concern, but ruled that the trial should continue, finding that the impact of the involvement of the intermediaries on the evidence in the case, as well as any

[242] Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries, March 2014, available at http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf

[243] See Christian M. De Vos, Case Note: Prosecutor v. Thomas Lubanga Dyilo: 'Someone Who Comes Between One Person and Another': Lubanga, Local Cooperation and the Right to a Fair Trial, Melbourne Journal of International Law, 2011 http://mjil.law.unimelb.edu.au/go/issues/issue-archive/volume-12-1; See also Elena Baylis, Outsourcing Investigations UCLA Journal of International Law and Foreign Affairs, volume 14, 2009

[244] Buisman Caroline, Delegating Investigations: Lessons to be Learned from the Lubanga Judgment, Northwestern Journal of International Human Rights, Volume 11, Issue 3

[245] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, at 48–50, available at http://www.icc-cpi.int/iccdocs/doc/doc1298128.pdf

[246] Supra note 16, par. 181; ICC, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v .Thomas Lubanga Dyilo, Prosecution's Response to the Defence's "Requête de la Défense aux Fins D'arrêt Définitif des Procedures", ICC-01/04-01/06-2678-Conf, par. 14

[247] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, at 50–52, available at http://www.icc-cpi.int/iccdocs/doc/doc1298128.pdf

prosecutorial misconduct or negligence, would be matters for its final judgment.[248] Altough, the OTP's position is that the intermediaries did not play more than "a supporting role"[249] the Chamber concluded that "the prosecution should not have delegated its investigative responsibilities to the intermediaries". The official investigators rarely visited the region where the investigations were conducted. On the rare occasions that they did, their movements were restricted for security reasons. The intermediaries carried out their activities mostly without supervision or direction.[250] The Katanga defense has pointed at the "systematic dangers" inherent to this process in which extensive unsupervised contact between intermediaries and potential witnesses was routine.[251]

2.4.1 Code of Conduct for Intermediaries (March 2014)[252]

Intermediary is an individual or organization who, upon request of an organ or unit of the Court or Counsel, conducts one or more of the activities mentioned in Section 1 of the Guidelines Governing the Relations between the Court and Intermediaries. Functions means the activities that an Intermediary and an organ or unit of the Court or Counsel agree shall be carried out by the Intermediary (section 1).

Concerning the confidentiality, an intermediary shall ensure that any dealings with a person with whom the intermediary has contact in the course its Functions respect the contacted person's confidentiality and privacy (section 4.1), shall make every effort to ensure that any material and information gained by virtue of its position is maintained securely (section 4.2) and shall not disclose any material or information identified as classified, as defined in Regulation 23bis of the Regulations of the Court, unless authorised to do so (section 4.3). An Intermediary shall not engage in any deliberate conduct or make any disclosure, which places or is likely to place at risk his/her/its security or the security of any other person (section 5.1).

2.4.2 Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries (March 2014)[253]

[248] ICC, TC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v .Thomas Lubanga Dyilo, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", ICC-01/04-01/06-2690-Red2, par. 74–92

[249] Supra note 16, par. 182

[250] Supra note 16, par. 482

[251] ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga And Mathieu Ngudjolo Chui, Second Corrigendum to the Defence Closing Brief, ICC-01/04-01/07-3266-Corr2-Red, par. 463

[252] Code of Conduct for Intermediaries, March 2014, available at http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/CCI-Eng.pdf

[253] Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries, March 2014, available at http://www.icc-

Activities of the Court take place in different countries, each of which involves distinct challenges. To facilitate activities in the field, the Court uses different forms of field presence. The effectiveness of the Court's activities also depends to a large extent on the cooperation it receives from community, regional, national (governmental) organizations and individuals operating in the country where the Court functions. To accomplish the objectives of the ICC St. and to carry out their functions effectively, the different organs and units of the Court and Counsel establish contacts within local communities and work together with local actors, i.e. so-called intermediaries.

Intermediaries may provide valuable support to the organs or units of the Court or Counsel, particularly to VPRS, Prosecution, PIDS and TFV, such as access to (remote) affected geographical areas; certain experience; cultural, linguistic or geographic proximity to affected communities or the ability to work with a low profile.

Intermediaries can perform the following functions with regard to each enumerated main purpose: (a) Assist with outreach and public information activities in the field; (b) Assist a party or participant to conduct investigations by identifying evidentiary leads and/or witnesses and facilitating contact with potential witnesses; (c) Assist (potential) victims in relation to submission of an application, request for supplementary information and/or notification of decisions concerning representation, participation or reparations; (d) Communicate with a victim/witness in situations in which direct communication with the Court could endanger the safety of the victim/witness; (e) Liaise between Legal Representatives and victims for the purposes of victim participation/reparations; and (f) Assist the TFV both in its mandate related to reparations ordered by the Court against a convicted person and in using other resources for the benefit of victims subject to the provisions of art. 79 ICC St.

Not everyone who carries out these functions in cooperation with an organ or unit of the Court or Counsel is considered as intermediarie for the purposes of the Guidelines. The services provided by an intermediary are generally provided on a voluntary basis, and are distinguished from those provided through a contract between an organ or unit of the Court or Counsel and an individual or company. Entities whose relationship with the Court is based on cooperation agreements (such as MoUs and national implementing legislation) are not considered to be intermediaries under the Guidelines, either. This stipulation covers, among others, the UN, inter-governmental organisations, international nongovernmental organizations based in the field, government bodies and national authorities. Rather, the present policy applies to intermediaries working under a contractual relationship with an organ or unit of the Court or Counsel.

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cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf

Although there is no direct legal basis relating to intermediaries found in ICC St. or the other core legal texts of the ICC, except in the Regulations of the Trust Fund for Victims (Regulations of the TFV, r. 67, Court-ASP/4/Res: "The Trust Fund may decide to use intermediaries to facilitate the disbursement of reparations awards, as necessary, where to do so would provide greater access to the beneficiary group and would not create any conflict of interest. Intermediaries may include interested States, intergovernmental organizations, as well as national or international nongovernmental organizations working in close proximity with the beneficiary groups."), the role of third parties of various kinds and capacities is directly or indirectly mentioned in these texts. For example, reg. 86.1 ICC Reg. anticipates that NGOs and individuals may assist in the dissemination of Standard Application Forms for victims' participation. With regard to protection, r. 87 of ICC RPE refers to possible orders from Chambers to apply protective measures for persons at risk on account of the activities of the Court.

The "Report of the Court on the Strategy in relation to Victims" recognizes that outside actors play an important role in assisting victims in relation to their participation in Court proceedings and states that the Court seeks a common approach with these actors. The Report also stresses that the Court is committed to ensuring adequate training and support, the sharing of good practices, and establishing clear and transparent relationships with intermediaries. The "Prosecutorial Strategy 2009-2012" contains an equal expression of the necessity to cooperate with a variety of outside actors. In particular, Objective 3 of the first Strategic Goal is to further develop policies for implementing the quality standards specified in the ICC St. and the ICC RPE with respect to all participants in proceedings, and persons (witnesses, victims and third parties/intermediaries) otherwise affected by the Court's activities. Finally, the "Strategic Plan for Outreach of the ICC" provides further guidelines for outreach activities and notes both the positive benefit of co-operating with partners and intermediaries and the need to promulgate intermediary selection criteria to avoid potential risks.

During the briefing, the organ or unit of the Court or Counsel explains to the intermediary the notion and different levels of confidentiality, and particularly about: a) Information that should not be disclosed to the public, but which the intermediary can disclose to other organs, witnesses, victims, participants or parties appearing before the Court; b) Information which the intermediary may not disclose to anyone other than the specific organ, unit, party or participants with whom he or she is cooperating; and c) Information which is subject to Court protective measures, and which can only be disclosed in a manner which is consistent with the protective measures in place. Documents and materials, in whatever form, acquired, produced or delivered by intermediaries as part of the contractual relationship with the Court must be kept strictly confidential, excluding what is publicly known.

Risks to intermediaries may be prevented or minimized by preventing or limiting public knowledge of intermediaries' cooperation with the Court and/or publication of

their identities. Nonetheless, intermediaries shall be informed that their cooperation with the Court and their identities may be disclosed to the parties and participants in the proceedings. Where an intermediary does not agree to cooperate under these conditions, the organ or unit of the Court or Counsel should disengage from him/her or not proceed in establishing a relationship. The organ or unit should also disengage or not proceed if an intermediary fails to observe and comply with best/good practices while engaged with the Court.

2.5 Hearsay evidence

The Defence for Mathieu Ngudjolo Chui objected to the fact that witness statements, reports and documents were based on hearsay. It acknowledged that there is no rule prohibiting the presentation of hearsay evidence but submitted that the Prosecution should nonetheless demonstrate its relevance and probative value.[254]

In respect of the witness statements, the Defence for Mathieu Ngudjolo Chui argued that the Prosecution has an even greater obligation at the confirmation hearing stage to demonstrate the relevance and probative value of the hearsay evidence in these witness statements since the Defence does not have the opportunity, at the confirmation hearing, to cross-examine the Prosecution witnesses. The Defence for Mathieu Ngudjolo Chui further argued that the Chamber should take into consideration the context in which the hearsay evidence was collected by the original witness. Thus, the Defence requested that the Chamber declare inadmissible the witness statements containing hearsay evidence. The Chamber exercised its discretion in determining the admissibility and probative value of all the evidence in accordance with the statutory framework of the Court, as previously set out in the Lubanga Decision. Accordingly, the Chamber was of the view that any challenges to hearsay evidence may affect its probative value, but not its admissibility.[255]

The Prosecution in Lubanga case in its analysis of the history of the ICC St. framework argued that it reflected, to a significant extent, the experience of other international criminal tribunals, which have consistently admitted hearsay evidence.[256]

It is well settled in the practice of the ICTY/ICTR that hearsay evidence is admissible. Thus, relevant out of Court statements which a TC considers probative are admissible under r. 89(C) of ICTY. [257]This was established in 1996 by the Decision of TC II in Prosecutor v. Tadic[258] and followed by TC I in Prosecutor v. Blaskic.[259] Accordingly,

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[254] Supra note 30, par. 132
[255] Supra note 30, par. 137
[256] Supra note 91
[257] Also Rule 89(B): In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. Rule 89(C): A Chamber may admit any relevant evidence which it deems to have probative value. Rule 89(D): A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial
[258] Supra note 26

TC have a broad discretion under r. 89(C) of ICTY to admit relevant hearsay evidence, since such evidence is admitted to prove the truth of its contents, a TC must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose. As Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence.[260] While hearsay evidence is not per se inadmissible, it is well established that a TC must be cautious in considering such evidence.[261]

2.6 Anonymous hearsay evidence

Information based on anonymous hearsay within an item of evidence could affect the probative value of those portions of the evidence which are based only on anonymous hearsay. The Chamber reiterates that it will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution.[262]

Thus, in coming to its conclusions, the Chamber should not rely solely on anonymous hearsay evidence. However, the Chamber does hold that information based on anonymous hearsay evidence may still be probative to the extent that it (i) corroborates other evidence in the record, or (ii) is corroborated by other evidence in the record.[263]

As has been stated: there is nothing in the ICC St. or ICC RPE which expressly provides that the evidence which can be considered hearsay from anonymous sources is inadmissible per se. In addition, the AC has accepted that, for the purpose of the

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[259] Supra note 27

[260] Supra note 25, par. 15

[261] ICTR, AC, Prosecutor v. Ndindabahizi, Appeal Judgemnt, Case no. ICTR-01-71, 16 January 2007, par. 115; ICTR, AC, Prosecutor v. Rutaganda, Appeal Judgement, Case no. ICTR-96-3, 26 May 2003, par. 34; ICTR, AC, Prosecutor v. Akayesu, Appeal Judgement, Case no. ICTR-96-4, 1 June 2001, par. 286-92; ICTR, TC I, Prosecutor v. Niyitegeka, Trial Judgement, Case no. ICTR-96-14, 16 May 2003, par. 43; ICTR, TC I, Prosecutor v. Ntakirutimana, Trial Judgement, Cases no. ICTR-96-10 & ICTR-96-17, 21 February 2003, par. 33; ICTR, TC I, Prosecutor v. Bagilishema, Trial Judgement, Case no. ICTR-95-1A, 7 June 2001, par. 25; ICTR, TC I, Prosecutor v. Musema, Trial Judgement, Case no. ICTR-96-13, 27 January 2000, par. 51. See also ICTY, AC, Prosecutor v. Naletilic and Martinovic, Appeal Judgement, Case no. IT-98-34, 3 May 2006, par. 516; ICTY, AC, Prosecutor v. Kordic and Cerkez, Appeal Judgement, Case no. IT-95-14/2, 17 December 2004, par. 281.

[262] Supra note 30, par. 139

[263] Supra note 30, par. 140

confirmation hearing, it is possible to use items of evidence which may contain anonymous hearsay, such as redacted versions of witness statements. Accordingly, the Chamber considers that objections pertaining to the use of anonymous hearsay evidence do not go to the admissibility of the evidence, but only to its probative value.[264]

The Chamber further recalls that in the Lubanga Decision it decided that it would determine the probative value of the NGO reports, e-mails, press articles and statements that "contain anonymous hearsay evidence in light of other evidence also admitted for the purposes of the confirmation hearing. However mindful of the difficulties that such evidence may cause the Defence in relation to the possibility of ascertaining its truthfulness and authenticity, the Chamber decides that, as a general rule, it will use this type of anonymous hearsay evidence only to corroborate other evidence.[265]

2.7 Press reports and newspaper articles

Media reports often contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources. Opinion evidence is, in principle, only admissible if it is provided by an expert. In the case of the newspaper accounts proffered by the Prosecution, the latter has failed to inform the Chamber either of the background and qualifications of the journalists or of their sources, in order to satisfy the Chamber as to their objectivity and professionalism. Under these circumstances, the Chamber is unable to attach sufficient probative value to the opinions of even informed bystanders such as journalists in relation to specific contested facts.[266]

2.8 Letters, manifestos, political statements and other documents emanating from persons or entities involved in the events

Many of these documents contain opinion evidence without qualifying their authors as experts. Where they make specific factual assertions about relevant political or military events, they can only be admitted if it can be shown that the authors have made reliable and objective reports. This is not the case for many of them. Therefore, even though some of the documents may contain information that is directly relevant to contentious issues in the case, the fact that they are assertions made by interested persons severely diminishes their probative value.[267]

Although such evidence will normally not be conclusive in this regard, it may be probative to the extent that it indicates that the author of the document believed that the person in question held a particular title or position. Similar considerations may apply to admissions of facts unfavourable to the person making the assertion.

[264] Supra note 30, par. 118; Supra note 105, par. 101, 103
[265] Supra note 30, par. 119; Supra note 105, par. 106
[266] Supra note 89, par. 31
[267] Supra note 89, par. 32

However, even in such cases, doubts about the author's objectivity or uncertainty about his or her sincerity may deprive the document of much of its potential probative value.[268]

2.9 Problems relying on third parties

The support of third-party organizations, in particular the UN and NGO's, can be helpful and necessary for a successful criminal investigation. Many of them were present in the area concerned long before the ICC investigators arrived. These entities tend to have a permanent presence there, making them generally more familiar with the territory than ICC investigators. Their assistance can be useful in providing details regarding potential witnesses, documentary or other evidence.[269]

Indeed, ICC Judges generally view NGO and UN reports with scepticism. They tend to decline to admit them into evidence or accredit them little, if any, evidential weight. In the Special Court for Sierra Leone, Justice Robertson Q.C. said the following: "Courts must guard against allowing Prosecutions to present evidence which amounts to no more than hearsay demonisation of defendants by human rights groups and the media. The right of sources to protection is not a charter for lazy Prosecutors to make a case based on second-hand media reports and human rights publications."[270]

It has been stated that these organizations have a very different mandate, and do not apply the standard of proof beyond reasonable doubt.[271] Nor do they share the Prosecutor's obligation to "investigate incriminating and exonerating circumstances equally" (art. 54(1)(a) ICC St.). In addition, the UN and NGOs are generally reluctant to provide the defense with any material, which increases the gap of resources between the two parties.[272]

[268] Supra note 89, par. 33

[269] See, e.g., Lyal S. Sunga, How Can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?, International Journal of Human Rights, volume 15, No 2, 2011, available at http://www.casematrixnetwork.org/fileadmin/documents/L._Sunga__How_Can_UN_Special_Procedures_Sharpen_ICC_Fact-Finding.pdf ; Human Rights First, The role of human rights NGO's in relation to ICC investigations, Sept. 2004, available at http://www.iccnow.org/documents/HRF-NGO_RoleInvestigations_0904.pdf

[270] SCSL, AC, Prosecutor v. Brima/ Kamara/ Kanu, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality, SCSL-04-16-T-506, 26 May 2006

[271] See, e.g., Lyal S. Sunga, How Can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?, International Journal of Human Rights, volume 15, No 2, 2011, available at http://www.casematrixnetwork.org/fileadmin/documents/L._Sunga__How_Can_UN_Special_Procedures_Sharpen_ICC_Fact-Finding.pdf ; Human Rights First, The role of human rights NGO's in relation to ICC investigations, Sept. 2004, p. 189-90, available at http://www.iccnow.org/documents/HRF-NGO_RoleInvestigations_0904.pdf

[272] Buisman Caroline, Defence and Fair Trial, in Supranational Criminal Law: A System Sui Generis, Roelof Haveman, Olga Kavran & Julian Nicholls eds., Intersentia, 2003, p. 167, 198–205; Baylis

In addition, UN and NGO fact-finders are not accountable to any judicial body, and no standardized methods of gathering the information exist, which makes it hard to test the validity of the research and conclusions. In addition, the fact-finders' knowledge of events is often limited, and they are not always neutral. Moreover, the bulk of UN and NGO material constitutes first- or even second-hand hearsay, or relies on dubious anonymous sources. Accordingly, the OTP's heavy reliance on UN and NGO investigations diminishes the quality of the investigations and compromises its independence.[273]

The NGOs, particularly MONUC, were only willing to share their work product with the OTP on the condition that it was not disclosed to anyone else at any stage of the proceedings. [274] Accordingly, under art. 54(3)(e) ICC St. the Prosecutor entered into confidentiality agreements with these organizations, agreeing not to disclose the bulk of the information it was given without the organizations prior consent. This inability to disclose prevented the Chamber from exercising its ultimate duty to assess whether the trial could still be fair if this material was not disclosed to the defense, and whether alternative measures were available to compensate the unfairness to the Defense caused by the non-disclosure.[275] The AC held that the OTP should concentrate its investigations on generating evidence which could be given in court, rather than collecting large volumes of material which could not be relied upon in determining the criminal liability of the accused because of confidentiality agreements. [276]

3. Direct evidence

Direct evidence provides first-hand information. Regardless of the party that presented it, direct evidence that is both relevant and trustworthy has a high probative value. It follows that a single piece of direct evidence may be decisive for the Chamber's determination in the decision.[277]

Elena, Outsourcing Investigations UCLA Journal of International Law and Foreign Affairs, volume 14, 2009, at. 145

[273] Bassiouni Cherif, The UN and Protection of Human Rights: Appraising UN Justice-Related Fact-Finding Missions, Washington University Journal of Law and Policy, Volume 5, 2001; Supra note 244; The lack of neutrality of some NGOs is apparent from their joint letter to the ICC Prosecutor, July 31, 2006. The ICJ in DRC v. Uganda declined to rely on a MONUC report tendered by DRC government, because of its use of second hand hearsay. See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, 2005 ICJ Rep. 116, par. 159 ; Baylis Elena, Outsourcing Investigations UCLA Journal of International Law and Foreign Affairs, volume 14, 2009

[274] In the case of the U.N., it is right to impose such conditions as was set out in the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, par. 18(3), July 22, 2004

[275] Supra note 70, par. 44–45, 50, 60–62, 87–89

[276] Supra note 67, par. 41

[277] Supra note 33, par. 83; Supra note 18, para. 49-54

4. Documentary evidence

Although it is permissible to tender documentary evidence directly without producing it by or through a witness under the ICC St. and the ICC RPE, this does not entail a lower standard of relevance or admissibility. On the contrary, the fact that evidence is being tendered without authentication by a witness may be an important factor in the Chamber's assessment of its admissibility.[278]

In the following paragraphs, the Chamber made some general observations about certain categories of documentary evidence which present particular characteristics: a. *Open-source information*. Material which is publicly available from an open source (e.g. internet or public libraries) will only require the tendering party to provide verifiable information about where the item can be obtained. If the item of evidence is no longer publicly available at the time it is tendered, the party should clearly indicate this and provide the date and location from which it was obtained. *b. Official documents.* Official documents that are not publicly available from official sources (e.g. the website of an organisation or official publications) are not self-authenticating and must be certified by the relevant authority. However, when the author of a public document is an identified representative or agent of an official body or organisation, such as a member of the executive, public administration or the judiciary, that document will be presumed authentic if it has been signed by the identified official and the authenticity of that signature is not called into question. Official documents with no identified author but whose origin is immediately apparent from the documents themselves (e.g. from a letterhead or logo) may be accepted by the Chamber without certification, unless their authenticity has been challenged by one of the parties. Generally, documents which do not bear extrinsic indications as to their origin and author must always be authenticated by way of attestation or affidavit from an identified representative of the originating organisation. Under these circumstances, the Chamber considers that it can accept as authenticated documents emanating from organisations performing public functions, even though they do not belong to regular state structures. *c. Private documents*. Private documents that can readily be authenticated by the party against whom they are tendered will be presumed authentic, unless such party challenges the authenticity and provides evidence to that effect. Private documents whose authenticity is dependent upon a connection with a third person or organisation must be authenticated by independent evidence. Such evidence must provide proof of authorship or adoption and integrity. If the date of the document cannot be inferred from the document itself, evidence of it should also be provided. Clearly, any form of authentication by the alleged author of the document is preferable. *d. Videos, films, photographs and audio recordings.* Before video or audio material can be admitted, the Chamber will require evidence of originality and integrity. However, once this has been established, this type of exhibit

[278] Supra note 89, par. 12

may often be admitted as evidence that speaks for itself and may be regarded, in this respect, as real evidence. Since the relevance of audio or video material depends on the date and/or location of recording, evidence must be provided in this regard.[279]

In the view of the Chamber, where authentication of documentary evidence can be derived from other sources, including witness statements, photographic evidence will be admissible for the purposes for which it is submitted and will be accorded probative value in proportion to (i) the level of authentication provided by the witness who introduces the evidence, and (ii) the reliability of the accompanying witness statement.[280]

In this regard, under art. 61(5) ICC St., the Prosecution "may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial." Moreover, there is nothing in the ICC St. and ICC RPE to indicate that statements, transcripts of interviews or summaries of evidence must be considered as having a lower probative value.[281]

5. Summary of statement

The use of summaries of statements provided by individuals who have not been interviewed by the Prosecutor has been challenged in many cases. The Chamber does not find any grounds in the statutory documents precluding the use of such documentary evidence, nor is there any indication that this evidence is otherwise inadmissible. Accordingly, the summaries of the statements even provided by non-ICC witnesses are admissible as evidence in the present case.[282]

The statements of witness in a summary form have a low probative value and if this summary statement is not corroborated by any other piece of evidence, it is not sufficient to be relied upon.[283]

However, the Prosecution in Katanga and Ngudjolo case has stated that art. 61(5) ICC St. permits the use of summary evidence at the confirmation hearing and that r. 63(4) ICC RPE prohibits the Chamber from imposing a corroborative requirement in order to prove any crime. The Prosecution took the position that "corroboration is not a condition precedent to the admissibility of summary evidence at the stage of the confirmation hearing." Concerning this issue, the Chamber recalls that the AC previously decided that: where the PTC takes sufficient steps to ensure that summaries of evidence in the circumstances described above are used in a manner

[279] Supra note 89, par. 24
[280] Supra note 30, par. 165
[281] Supra note 105, par. 128
[282] Supra note 33, par. 78
[283] Supra note 18, par. 396

that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial, the use of such summaries is permissible.[284]

However, the Prosecution's right to rely on summary evidence in accordance with art. 61(5) ICC St. must be balanced with the right of the Defence, in accordance with art. 61(6) ICC St., to challenge the evidence presented by the Prosecution.[285]

In the circumstances, when examining these statements, the Chamber will assess such witnesses' testimony in light of the evidence presented as a whole. When examining these statements, the Chamber will be mindful of the risks that attach to the evidence of insider witnesses and will therefore treat such evidence with caution. [286]

6. Anonymous summary of statement

The Chamber notes that the use of anonymous witness statements and summaries is permitted at the pre-trial stage pursuant to art. 61(5) and 68(5) ICC St. and r. 81(4) ICC RPE. However, the Chamber shares the view, adopted in other pre-trial decisions, that the use of evidence emanating from anonymous sources or from summaries of witnesses statements - regardless of its direct or indirect nature - may impact on the ability of the Defence to challenge the credibility of the source and the probative value of such evidence. Therefore, to counterbalance the disadvantage that this might cause to the Defence, such evidence is considered as having a lower probative value than that attached to the statements of witnesses whose identity is known to the Defence and for which a full statement has been made available to it. The Chamber will thus analyze anonymous witness statements and summaries on a case-by-case basis and evaluate them for the purposes of the present decision taking into account whether there is corroboration by other evidence.[287]

The Defence for Mathieu Ngudjolo Chui raised an objection concerning the use of the summaries of the statements of some witnesses as evidence on the ground that uncorroborated testimony of anonymous witnesses is highly prejudicial to the rights of the defence. It submitted that because it is unable to verify the credibility or probative value of such evidence, the Chamber should decide that it is inadmissible, or, in the alternative, determine that it has little or no probative value.[288] While the Chamber does take note of the Prosecution's reference to r. 63(4) ICC RPE which states that the Chamber "shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the court", it is of the view that, this provision notwithstanding, the Chamber may, pursuant to art. 69(4) ICC St., determine that the evidence will have a lower probative value if the Defence

[284] Supra note 30, par. 157
[285] Supra note 47, par. 50
[286] ICC, PTC I, Situation in Darfur, Sudan in the Case of the Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Corrigendum of the "Decision on the Confirmation of Charges, ICC-02/05-03/09-121-Corr-Red, par. 42
[287] Supra note 33, par. 90; See also Supra note 47, par. 49
[288] Supra note 30, par. 154

does not know the witness's identity and only a summary of the statement, and not the entire statement, may be challenged or assessed.[289]

The Chamber also reiterates those principles established in the Abu Garda Decision as to the probative value of summaries of interviews of anonymous witnesses submitted by the Prosecutor. Of particular relevance to the present case are the following findings: i. the use of summary evidence is expressly allowed by the legal instruments of the Court and, accordingly, the Prosecutor should not be unduly prejudiced as a result of using such evidence; and ii. with a view to preserving the rights of the Defence, statements of anonymous witnesses, whilst admissible, have to be evaluated on a case-by-case basis, depending on whether the information contained therein is corroborated or supported by other evidence presented into the case file.[290]

[289] Supra note 30, par. 159

[290] Supra note 286, par. 41

PART B: MODIFICATION OF LEGAL CHARACTERIZATION OF FACTS IN THE ICC SYSTEM

CHAPTER I: THE CONCEPTUAL BACKGROUND

1. Confirmation of charges

Pursuant to art. 61 (7) ICC St.: The PTC shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the PTC shall: a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a TC for trial on the charges as confirmed; b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence; c) Adjourn the hearing and request the Prosecutor to consider: i) Providing further evidence or conducting further investigation with respect to a particular charge; or ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

In accordance with art. 61(1) ICC St., the purpose of the confirmation hearing is "to confirm the charges on which the Prosecutor intends to seek trial". The word "confirm" means to "make valid by formal authoritative assent; to ratify, sanction" (Oxford English dictionary). The Chamber's understanding of the confirmation process is that the PTC validates the charges as formulated by the Prosecution by determining that there is sufficient evidence to establish substantial grounds to believe the factual allegations made by the prosecution in support of the charges. The charges are formulated by the prosecution prior to the confirmation hearing and are presented in the DCC.[291]

It is undisputed that one of the main purposes of the confirmation phase is to filter the cases that should go to trial from those which should not. Bearing in mind the enormous consequences of a trial for the person charged, this filtering function not only ensures fairness but also avoids, when the "sufficiency standard" cannot be met, unnecessary public stigmatisation and other negative consequences for the person over the foreseeable long time span of a trial. In such a case, unwarranted lengthy proceedings would also lead to huge expenses and amount to a violation of the necessity to ensure, as much as possible, judicial economy in the interest of justice. Needless to say, it remains the responsibility of the Chamber to ensure that the nature and purpose of the confirmation are not overstretched or distorted in particular

[291] ICC, TC V, Situation in the Republic of Kenya in the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, "Decision on the content of the updated document containing the charges", ICC-01/09-01/11-522, par. 14

through possible Defence attempts to turn the confirmation in a "trial before the trial".[292]

Throughout the proceedings, the Chambers consistently reiterated this principle and asserted that the confirmation hearing has a limited scope and purpose and should not be seen as a "mini-trial" or a "trial before the trial."[293]

On the basis of the limited scope and purpose of the confirmation of charges hearing, the expectations are that the parties, being cognizant of the nature of the present proceedings, select their best pieces of evidence in order to support their respective cases.[294]

At no point should PTC exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect. The Chamber, therefore, shall not evaluate whether the evidence is sufficient to sustain a future conviction: Such a high standard is not compatible with the standard under art. 61(7) ICC St.[295]

This view is consistent with the fact that, given the limited purpose of the confirmation hearing, the evidentiary threshold at the pre-trial stage is lower than that applicable at the trial stage. In more general terms, the Prosecutor is not required to tender into the record of the case more evidence than is, in his view, necessary to convince the Chamber that the charges should be confirmed.[296] The evidentiary threshold to be met for the purposes of the confirmation hearing cannot exceed the standard of "substantial grounds to believe", as provided for in art. 61(7) ICC St.[297]

The Chamber's role at the current stage of the proceedings is to determine whether sufficient evidence has been adduced to establish substantial grounds to believe that the suspects committed the crimes charged. Such evidence adduced is in fact the outcome of the Prosecutor's investigations. If has failed to investigate properly, this will certainly have a bearing on the quality and sufficiency of the evidence presented and the matter will be finally decided by way of an examination of the said evidence pursuant to art. 61(7) ICC St. Therefore, under no circumstances will a failure on the part of the Prosecutor to properly investigate, automatically justify a decision of the Chamber to decline to confirm the charges, without having examined the evidence presented. In other words, the scope of determination under art. 61(7) ICC St. relates

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[292] Supra note 37, par. 61

[293] Supra note 30, par. 64

[294] Supra note 19, par. 11

[295] Supra note 47, par. 40; Such standard can be found in some ICTY precedents related to the confirmation of the indictment. For instance, it is mentioned that "(...) in Kordic et al.. Judge McDonald adopted a higher standard, as a 'credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge'"

[296] Supra note 286, par. 40

[297] Supra note 30, par. 62

to the assessment of the evidence available and not the manner in which the Prosecutor conducted his investigations.[298]

In the Decision on the Confirmation of Charges in the case of The Prosecutor v. Thomas Lubanga Dyilo[299], the Chamber relied on internationally recognised human rights jurisprudence for its interpretation of the evidentiary standard of "substantial grounds to believe" in accordance with art. 21(3) ICC St. In order for the Prosecution to meet its evidentiary burden under art. 61(7) ICC St., it must present concrete and tangible evidence which "demonstrate a clear line of reasoning underpinning its specific allegations." In determining whether the Prosecution has met the evidentiary threshold, the Chamber recognizes that the evidence the Prosecution presented must be analyzed and assessed as a whole. The Chamber's consideration of the evidence thus will not be limited to the evidence discussed during the confirmation hearing, but will include all of the evidence tendered by the Prosecution in the case file. Therefore, the Chamber may, unless it expressly rules that an evidentiary item is inadmissible, rely on any evidence either provided in the Prosecution's Amended List of Evidence or presented at the confirmation hearing.[300]

In line with its established case law, the Chamber, whilst assessing all of the evidence presented for the purposes of the confirmation hearing, only makes reference to specific items of evidence and specific facts which, in its view, support its findings as to whether there are substantial grounds to believe that the suspects committed any or all of the crimes charged by the Prosecutor. Accordingly, the items of evidence and the facts referred to in the present decision are included for the sole purpose of providing the reasoning underpinning the Chamber's determination, without prejudice to the relevance of additional items of evidence or subsidiary facts that could also support the same findings.[301]

Accordingly, the Chamber declined to confirm the charges against Mr Abu Garda, without prejudice for the Prosecution to subsequently request the confirmation of the charges against him, if such request is supported by additional evidence, in accordance with art. 61(8) ICC St.[302]

In this respect, needless to say, if even one of the cumulative constituent elements of the crimes charged is not established to the required threshold under art. 61(7) ICC St., this would be sufficient for the Chamber to decide not to confirm the charges. The burden of proof lies indeed with the Prosecutor who is statutorily called, pursuant to art. 61(5) ICC St., to support each charge - and therefore each and every constituent

[298] Supra note 33, par. 63
[299] Supra note 105
[300] Supra note 30, par. 65,66; Supra note 105, par. 39; Supra note 47, par. 41
[301] Supra note 286, par. 39
[302] Supra note 47, par. 236

element of the crimes and the mode of liability as charged - with sufficient evidence to convince the Chamber to the requisite threshold.[303]

If the charges are then confirmed, art. 74(2) ICC St. and reg. 55 ICC Reg., make clear that the factual subject matter of the case will be settled for the purposes of the trial in light of the confirmed charge(s) and, therefore, in light of the facts and circumstances described therein. More appropriately, the Chamber shall analyze subsidiary facts only to the extent that this is necessary, in light of the parties' submissions or the Chamber's own assessment, to ascertain whether the facts described in the charges are sufficiently established to the threshold required at this stage of proceedings. In the understanding of the Chamber, this does not prevent the Prosecutor from relying on these or other subsidiary facts in the future, in the same way that the parties are not precluded from relying at trial upon new or additional evidence from that presented at the pre-trial stage of the case.[304]

As stated in the Order regarding the Content of the Charges, such understanding is also reflected in art. 61(7) ICC St., which gives the PTC the power to: confirm the charges, decline to confirm the charges and adjourn the hearing. There is no provision authorizing the PTC to modify the charges formulated by the Prosecution. On the contrary, when the evidence appears to establish a different crime, pursuant to article 61(7)(c)(ii) ICC St. the PTC may request the Prosecution to consider amending a charge. Importantly, it is the prosecution which would then amend such a charge, not the PTC. Another provision authorizing amendments to the charges is art. 61(9) ICC St., conferring on the Prosecution the authority to amend, with the permission of the PTC.[305]

2. Specific parameters and approaches

As in domestic criminal proceedings, an international indictment may be amended or withdrawn. [306]Amendments and clarifications are common at the ICTY and ICTR and the required judicial approval has normally been granted; the main consideration is whether the amendment will cause unfair prejudice to the accused. [307]A 'new charge' requires a new confirmation and to be supported by evidence. Amendments may also

[303] Supra note 19, par. 26
[304] Supra note 33, par. 60
[305] Supra note 291, par. 15
[306] Rr. 50–1 ICTY RPE and ICTR RPE; see also, e.g. ICTY, TC II, Prosecutor v. Dragan Nikolic´, Review of indictment pursuant to rule 61 ICTY RPE, Case No IT-94-2-R61, 20.10.1995, par. 32; Art. 61(4) ICC Statute
[307] E.g. ICTY, TC I, Prosecutor v. Naletilic´ and Martinovic´, Decision on Vinko Martinovic's objection to the amended indictment and Mladen Naletilic's preliminary motion to the amended indictment, Case no. IT-98-34, 14 February 2001. Regarding other circumstances to consider, such as delays, see e.g. ICTY, AC, Prosecutor v. Kovačevic, Decision stating reason for appeal chamber order of 29 May 1998, Case no. IT-97-24, 2 July 1998 and ICTR, AC, Prosecutor v. Karemera et al., Decision on Prosecutor's interlocutory appeal against Trial Chamber III, Decision of 8 October 2003 denying leave to file an amended indictment, Case no. ICTR-98-44, 19 December 2003

be made during trial[308] but not on appeal.[309] Post-confirmation, the ICC Prosecutor may amend the charges only with permission of the PTC; a new confirmation is required if the Prosecutor 'seeks to add additional charges or to substitute more serious charges'.[310]But without a formal hierarchy of crimes the notion of 'more serious charges' will cause difficulties in practice. Moreover, the provisions refer only to amendments 'before the trial has begun' and thus beg the question whether any amendments may be made thereafter. Different interpretations are possible. A complete ban on amendments at trial could result in acquittals on 'technical' grounds, although this may be counteracted by the chamber's power to 'modify the legal characterization' of the facts. [311]

In many civil law jurisdictions and mixed jurisdictions, the conduct – the acts or omissions – is instead decisive, not the legal categorization of the 'offence'. The principle iura novit curia (the court knows the law) applies and, therefore, the prosecutor's legal characterization is not binding but merely a theory (a recommendation). The ICTY TC in Kupreškic´ et al. discussed the possible application of this principle but concluded that it should not be applied. The Chamber was prepared to apply a lesser included offence theory and gave some examples which, however, require an established hierarchy of offences and of modes of criminal liability (crimes against humanity more serious than war crimes, perpetration more serious than aiding or abetting, etc.).[312] In the ICC, however, an expression of the iura novit curia principle has been established in the ICC Reg., allowing a Chamber to 'modify the legal characterization' of the facts: reg. 55 of the ICC Reg. That is, to determine that the facts and circumstances pleaded in the charges should be characterized as a different crime or a different form of participation from that which the Prosecutor has chosen.[313]

Very controversially, the Lubanga PTC applied the modification provisions when confirming the charges and substituted charges of war crimes in a non-international armed conflict for the same offences in an international armed conflict.[314] Requests

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[308] ICTR, AC, Prosecutor v. Akayesu, Appeal Judgement, Case no. ICTR-96-4, 1 June 2001, par. 120

[309] ICTR, AC, Prosecutor v. Niyitegeka, Appeal, Judgement, Case no. ICTR-96-14, 9 July 2004, para. 196

[310] Art. 61(4)(9) ICC St.

[311] Supra note 3 p. 455, 456

[312] ICTY, TC, Prosecutor v. Kupreskic et al., Judgment, Case no. IT-95-16, 14 January 2000, par. 744–6. The issue was raised but not considered in ICTY, AC, Prosecutor v. Aleksovski, Appeal Judgment, Case no. IT-95-14/1, 24 March 2000, par. 55; ICTR, TC III, Prosecutor v. Karemera et al., Decision on the prosecutor's motion for leave to amend the indictment Rule 50 of the Rules of Procedure and Evidence, Case no. ICTR-98-44, 13 February 2004, par. 47, where the Trial Chamber indicated that it would apply the principle of iura novit curia at the close of the proceedings. Similarly, ICTR, TC, Prosecutor v. Ntagerura et al., Decison on the prosecutor's request pursuant to rule 99(b), Case no. ICTR-99-46, 25 February 2004, par. 36–8

[313] Supra note 3, p. 458

[314] ICC, PTC I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v.Lubanga, Ordonnance autorisante la prise de photographies a l audience du 29 January 2007, ICC-01/04-01/06-795

for leave to appeal the decision were later denied. This is difficult to reconcile with art. 61(7) ICC St.[315] It resulted in the Prosecutor prosecuting something other than he planned to do (based on the evidence available to him) and the TC having to determine at the trial to what extent the confirmation findings were binding or not. The TC did not consider itself competent to annul or amend the confirmed charges, but provided the procedural solution of allowing the parties to present evidence relating to both classifications of the conflict. It might be that the TC will have to recharacterize the charges again to set things right. In the meantime, the TC has announced the possible application of the modification provision on a different point, whereby the majority and minority views expose conceptual differences concerning 'amendments' of the charges which stem from different domestic legal traditions.[316] The decision was reversed, however, and the AC concluded that the modification provisions, while compatible with the ICC St. and the defendant's right to a fair trial, had been incorrectly applied by the majority of the TC in that they may not be used to exceed the facts and circumstances described in the charges or any amendment thereto.[317]

The debate has remained unresolved in the context of the constitutive documents of the ICC. Several attempts were made to firmly establish either a common law or a civil law methodology in the ICC St. or ICC RPE. But none of the two approaches managed to gain full support among States parties. The drafters of the regulation gave preference to a civil law methodology (''legal qualification of facts'') over a common law methodology (''amendment of the charges'') because the former was better equipped to maintain the careful balance between the powers of the TC and the powers of the PTC within the specific context of art. 61 (9) ICC St.[318]

Neither the ICC St. nor ICC RPE have solved the question of how a TC shall proceed, if the legal ingredients of a charge have not been proven but the evidence shows that a crime of a different nature may have been perpetrated. Moreover, legal uncertainty

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[315] See, e.g. Michaela Miraglia, 'Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga', Journal of International Criminal Justice, 2008, p. 489, 501–3. For the better solution of requesting the Prosecutor to reconsider the charges, see ICC, PTC III, Situtation in the Central African Republic in the case of the Prosecutor v. Bemba Gombo, Decision adjourning the hearing pursuant to article 61(7)(c)(ii) of the Rome Statute, ICC-01/05-01/08-388

[316] Supra note 3, p. 458

[317] ICC, AC, Situation the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2205; See also ICC, TC I, Situation the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga, Decision on the Legal Representatives' Joint Submissions conceming the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-2223

[318] Carsten S., Modification of the Legal Characterization of Facts in the ICC System: A Portrayal Of Regulation 55, Criminal Law Forum, 2005, 16: 1–31

about the possibility to correct flaws in the charges at the trial stage directly affects prosecutorial strategy and judicial economy. The absence of commonly accepted procedural methodology increases the risk that the Prosecutor will burden the Chambers of the Court with an overload of alternative or cumulative charges in order to avoid the risk of acquittal.[319]

2.1 Interpretory choices under the ICC system[320]

Taking into account the role of the PTC as a filter for the trial, one may argue that the charges are ‘‘frozen’’ after their confirmation by the PTC (‘‘freezing theory’’) – an interpretation which leaves little flexibility to the TC. Alternatively, one might argue that the powers of the TC are broad enough to allow a change of the content of the charges at any time at trial by way of an amendment of the charges (‘‘amendment theory’’). Finally, an intermediate approach acknowledges the power of TC to change the legal classification of facts at trial, while excluding its authority to deviate from the facts described in the charges.

(i) The ‘‘freezing’’ theory

Proponents of the ‘‘freezing theory’’ criticize the permissibility and merits of the concept of the legal characterization of fact at the trial stage on the ground that it downplays the role and function of the PTC in the determination of the normative content of the trial. Art. 61 ICC St., so goes the argument, contains specific provisions on both the content and possible amendments of the charges. These detailed procedural rules indicate that the PTC has the primary responsibility for determining the factual and legal ingredients which form the basis of the trial.

Nevertheless, this argument does not offer sufficient grounds to exclude the possibility of a change of the legal qualification of facts by the TC. The powers of the PTC are not designed to curtail the powers of interpretation of the TC. The TC is bound by a stricter standard of assessment in the determination of guilt. It must be convinced ‘‘beyond reasonable doubt’’ (art. 66(3) ICC St.). Moreover, it cannot be assumed that the PTC enjoys the exclusive responsibility to fix the content of the proceedings. The TC enjoys considerable flexibility in the organization of trial. It may, in particular, refer ‘‘preliminary issues to the PTC’’, (art. 64(4) ICC St.) ‘‘exercise any functions of the PTC referred to in art. 61(11) ICC St.’’, (art. 64(6) ICC St.) and ‘‘order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties’’(art. 64(6)(d) ICC St.). Both factors indicate that the factual and the legal classification of crimes in the charges are not ‘‘frozen’’ by the evidence and legal findings made at the confirmation hearing. It

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[319] Supra note 318; For recommendations concerning the charging policy of the Office of the Prosecutor (OTP) and the adoption of the principle of the legal characterization of facts, see generally Informal Expert Paper: Measures available to the International Criminal Court to reduce the length of proceedings, 2003, paras. 41–46, at http:// www.icc-cpi.int/library/organs/otp/length_of_proceedings.pdf

[320] Supra note 318

is therefore untenable to challenge the principle of the legal characterization of facts at the trial stage on the basis of the functions of the PTC.

(ii) ‘‘The amendment theory’’

The ‘‘amendment theory’’ is also subject to legal criticism. Under the ICC St., the charges are fixed at the stage of the confirmation hearing. Afterwards, ‘‘the Prosecutor may, with the permission of the TC, withdraw the charges’’ under article 61(9) ICC St., third sentence. But most authorities agree [321] that the Prosecutor cannot amend or aggravate the charges after the commencement of the trial (argumentum e contrario), because the two previous sentences of art. 61(9) ICC St., link the right to amend the charges, to add additional charges or to substitute more serious charges exclusively to the period ‘‘before the trial has begun’’.

The only way to justify possible amendments of the charges at the trial stage would be to argue that such a power is implied by arts. 64(6)(a) and 61(11) ICC St., which allow the TC to ‘‘exercise any function of the PTC that is relevant and capable of application’’ in trial proceedings – an argument made by Triffterer in his Commentary on the ICC St.[322] Triffterer argues that an amendment of charges at the trial stage is possible under article 64(6) lit (a) ICC St. in conjunction with art. 61(11) ICC St. Article 64 (6)(a) ICC St. provides that the TC may, as necessary, exercise any functions of the PTC referred to in art. 61(11) ICC St. Article 61(11) ICC St. states that ‘‘[o]nce the charges have been confirmed in accordance with this article, the Presidency shall constitute a TC, which subject to paragraph 9 and to art. 64(4) ICC St., shall be responsible for the conduct of subsequent proceedings and may exercise any function of the PTC that is relevant and capable of application in those proceedings’’. Triffterer writes: ‘‘[S]ince the TC according to paragraph 6(a) ICC St. may ‘‘exercise any functions of the PTC referred to in art. 61(11) ICC St.’’, wherein there is reference to ‘‘any function of the PTC that is relevant and capable of application in those proceedings’’, meaning proceedings before the TC, the Chamber may, on a motion of the Prosecutor decide on an amendment of the charges ‘‘after notice to the accused ’’, as provided for in art. 61(9) ICC St., and an opportunity to file a motion on the question of amending the charges has been provided. Depending on the stage of the proceeding, it must be guaranteed that an adequate defence and the principles of fair trial are not violated by belated notice of a proposed amendment’’. Such an interpretation conflicts, however, with the express wording of art. 61(11) ICC St., which states explicitly that the possible exercise of the powers of the PTC by the

[321] See Kuniji Shibahara, Article 61, in “Commentary on the Rome Statute of the International Criminal Court”, Otto Triffterer ed., 1999, at 792 (‘‘After commencement of the trial, amendment of the charges is not admitted’’); Bitti, at 280 (‘‘the charges are frozen after the commencement of the trial’’); Friman, at 208 (‘‘[I]t has been argued in the literature that amendments at trial are possible for reasons of practicability ... This argument is not obvious, however, since amendments at trial so clearly are omitted in the statutory provisions’’

[322] See Otto Triffterer, Article 74, in “Commentary On The Rome Statute Of The International Criminal Court”, at 962

TC is ‘‘subject to’’ art. 61(9) ICC St. This reference can only be reasonably interpreted as an exclusion of amendments of the charges at the trial stage. Otherwise the third sentence of art. 61(9) ICC St. would be pointless. This position receives even further support from the ICC RPE. The rules provide for an amendment of charges only in the phase before the closure of the pre-trial Procedure, (Chapter V, Section VI, r.128) but not at the trial stage (Chapter VI RPE).

(iii) The case in favor of the concept of legal characterization of facts

There is, however, a strong case in favor of the adoption of the concept of the legal qualification of facts under the ICC system. This approach preserves the principle of the exclusion of an amendment of the charges after the confirmation hearing, while providing the TC with a flexible interpretative device to correct legal flaws in the indictment within the confines of the facts and circumstances described in the charges. The theory of the legal characterization of facts is in conformity with both, the wording of art. 74(2) ICC St., and the fine procedural balance between the TC and the PTC under the ICC system.

2.2 The jurisprudence of the ICTY

The ICTY has declined to adopt the principle of the legal characterization of the facts in its jurisprudence in the Kupreskic case. [323]The TC found it inappropriate to grant the judges of the Tribunal the power to change the legal qualification of facts on their own motion, due to the alleged lack of precision in the definition of crimes under international criminal law at the given stage in time and the potential damage of the lack of legal certainty in the procedure to the rights of the accused.[324]

The tribunal examined the issue in the context of its jurisprudence on cumulative and alternative charges in Kupreskic. In this case, the TC opted for a common law-oriented approach with a limited possibility to legally reclassify the offence without amendment of the charges. The Chamber introduced a distinction between ‘‘included offences’’, ‘‘more serious offences’’ and ‘‘different offences’’. It decided that a TC may apply a lesser included offence than that contained in the indictment [325] or reclassify the particular form of commission/participation, if it decides to convict the accused for participation instead of perpetration (e.g. aiding and abetting instead of commission).[326] The Chamber noted: ‘‘If ... the TC finds in the course of the trial that the evidence conclusively shows that the accused has committed a more serious crime than the one charged, it may call upon the Prosecutor to consider amending the

[323] ICTY, TC, Prosecutor v. Kupreskic et al., Judgment, Case no. IT-95-16, 14 January 2000

[324] Supra note 318

[325] Supra note 323, par. 745

[326] Supra note 323, par. 746 (‘‘[T]he Trial Chamber may conclude that the facts proven by the Prosecutor do not showthat the accused is guilty of having perpetrated a war crime; they showinstead that he aided and abetted the commission of the crime. In this case, the Trial Chamber may classify the offence in a manner different from that suggested by the Prosecutor, without previously notifying theDefence of the change in the nomen iuris’’

indictment. Alternatively, it may decide to convict the accused of the lesser offence charged. The same course of action should be taken by the TC in the event the Prosecutor should decide not to accede to the TC's request that the indictment be amended. Similarly, if the TC finds in the course of trial that only a different offence can be held to have been proved, it should ask the Prosecutor to amend the indictment. If the Prosecutor does not comply with this request, the TC shall have no choice but to dismiss the charge''.[327]

The Chamber conducted a comparative survey of the treatment of the legal classification of facts in various jurisdictions. It concluded this analysis with the finding that ''it is apparent ... that no general principle of criminal law common to all major legal systems of the world may be found''.[328]

The TC decided not to adopt the principle of the legal qualification of facts in its jurisprudence on the basis of two assumptions: an apparent gap of legal certainty in the architecture of international criminal law and the potentially negative impact of this gap on the rights of the accused in the procedure of legal re-classification at the trial stage. The Chamber noted: ''[I]t must be emphasized ... that at present, international criminal rules are still in a rudimentary state. They need to be elaborated and rendered more specific either by international law-making bodies or by international case law so as to gradually give rise to general rules. In this state of flux the rights of the accused would not be satisfactorily safeguarded were one to adopt an approach akin to that of some civil law countries….Hence, even though the iura novit curia principle is normally applied in international judicial proceedings, under present circumstances it would be inappropriate for this principle to be followed in proceedings before international criminal courts, where the rights of an accused are at stake. It would also violate art. 21(4)(a) of the ICTY St., which provides that an accused shall be informed 'promptly and in detail' of the 'nature and cause of the charge against him'.[329]

The assertion that the rules of international criminal law are still in a state of flux is certainly correct and reasonably well founded in the context of the normative framework of the ICTY. But the argument of legal uncertainty applies with much less force to the ICC treaty system. With its 128 articles, 225 rules, the elements of crimes and over 100 Regulations, the legal framework of the ICC is quite detailed in substance and, in some areas like the definition of crimes, even exposed to the criticism of over-regulation. The fear that the accused might be inadequately equipped to adjust its defence strategy to changes in the legal qualification of crimes due to uncertainties about the law is therefore much less founded under the ICC system. The inclusion of the concept of the legal characterization of facts in the Regulations of the ICC indicates that the jurisprudence of the ICTY TC in Kupreskic was very system-

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[327] Supra note 323, par. 747–748

[328] Supra note 323, par. 738

[329] Supra note 323, par. 740

oriented and perhaps over-pessimistic in its general objection to the concept of the legal characterization of facts on the grounds of the protection of the accused.[330]

2.3 Legal foundations

2.3.1 The legality of regulation 55 ICC Regulations

The adoption of the concept of the legal characterization of facts is in line with both the legal framework of the ICC and international human rights law. Two aspects deserve closer attention in this regard. First of all, reg. 55 ICC Reg. does not institute a new procedural device per se. It simply clarifies an interpretative choice offered to the judges of the Court under art. 74(2) ICC St. Moreover, the regulation addresses the human rights concerns raised by the ICTY TC in Kupreskic. It grants the accused not only the minimum level of protection required under international human rights law and national Codes of Criminal Procedure, but provides additional substantial safeguards to ensure that the rights of the Defense are adequately protected in all circumstances, in particular, in situations in which the legal re-characterization of the facts confronts the accused with new or different crimes in the course of the trial.[331]

Regulation 55 ICC Reg. covers these different situations (re-qualification of the modalities of the same crime, re-characterization of facts as a different crime) by giving the Chamber authority to change the legal characterization of facts to accord with ‘‘the crimes under arts. 6, 7, 8 ICC St. ’’ or with ‘‘the form of participation of the accused under arts. 25 and 28 ICC St.’’. This formulation covers several cases, including: – a change in the form of the perpetration of the crime under article 25(3) ICC St. (e.g. re-classification of the form of participation, or requalification of participation as commission); – a qualification of conduct as a different sub-category of crime (e.g. classification as torture as a crime against humanity rather than rape as a crime against humanity); and – a qualification as a different category of crime, including a possible ‘‘increase in qualification’’ (e.g. qualification of conduct as torture as a crime against humanity rather than inhumane treatment of civilians as a war crime, or classification of conduct as genocide rather than extermination of civilians as a crime against humanity). [332]

It should be noted that an ‘‘increase in qualification’’ of crimes by the TC is not excluded by art. 61(9) ICC St. All the core crimes carry the same penalty (art. 77 ICC St.). A change in legal qualification does herefore not necessarily entail a conviction for ‘‘a more serious crime’’, even if the conduct of the accused is qualified as genocide rather than as a crime against humanity. Furthermore, a qualification of conduct as a different legal crime does not constitute an ‘‘additional charge’’ or a ‘‘more serious charge’’ within the meaning of art. 61(9) ICC St. The qualification of facts by the TC is not an amendment of the charge after the beginning of the trial (as

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[330] Supra note 318
[331] Supra note 318
[332] Supra note 318

prohibited by art. 61(9) ICC St., third sentence), but a technique of legal interpretation of the Chamber, which must be exclusively based on the facts and circumstances described in the original charge. This safeguard excludes any possibility that the accused is convicted on the basis of factual elements or conduct that was not made available to him/her.[333]

This regulation is more than another technical addition to the already voluminous procedural framework of the ICC St. It presents a unique procedural device, which is inspired by domestic legal traditions, but carefully adjusted to the particular needs of international criminal justice.[334]

Hence, provided a TC does not overstep the factual and circumstantial framework described in the charges, reg. 55 ICC Reg. allows it to modify the legal characterization of the facts to accord with the crimes under the Statute or to accord with the form of participation of the accused in the crimes under articles 25 and 28 ICC St. Under reg. 55(1) ICC Reg., the legal characterization of the facts may be altered in a decision rendered by a Chamber under art. 74 ICC St. However, as reg. 55(2) ICC Reg. states, if "at any time during the trial", it appears to the Chamber concerned that the legal characterization of the facts may be subject to change, it shall give notice to the participants in the proceedings of such a possibility and, having heard the evidence, shall, at an appropriate stage, give the participants the opportunity to make submissions. Regulation 55 sets out the safeguards that must be respected to protect the rights of the accused. The accused must have adequate time and facilities for the effective preparation of his or her defence, and be given the opportunity to request the presentation of any evidence or witness that he or she considers necessary, in accordance with art. 67(1)(e) ICC St.[335]

It should be recalled that in Lubanga, the AC clearly and unanimously upheld the legality of reg. 55 ICC Reg. in the light of the provisions of ICC St., emphasizing that applicable human rights standards allow the modification of the legal characterization in the course of a trial, as long as this does not adversely affect the fairness of the trial. It further emphasized that, in its view, "a principal purpose of reg. 55 ICC Reg. is to close accountability gaps, a purpose that is fully consistent with the Statute" and it observed that "Mr Lubanga Dyilo's interpretation of art. 61(9) ICC St. bears the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at the trial".[336]

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[333] Supra note 318

[334] Supra note 318; See also Claus Kress, The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise, Journal of International Criminal Justice, 2003. Regulation 55 reflects another step towards the crystallization of a truly international law of procedure in the ICC system; Safferling Christoph, Towards An International Criminal Procedure, Oxford University Press, 2001

[335] Supra note 146, par. 11

[336] Supra note 146, par. 12

2.3.1.1 Regulation 55 ICC Regulations and international human standards

The main legal challenge arising in relation to reg. 55 ICC Reg. is therefore not so much the issue of statutory authority, but the question of to what extent the principle of the legal characterization of facts can be reconciled with the rights of the accused in light of the Kupreskic jurisprudence of the ICTY. The TC in Kupreskic made this point very clear when it noted that the principle of the legal characterization of facts could not be introduced in international criminal proceedings, without providing sufficient protection for the accused, including the right to ‘‘be informed ‘promptly and in detail’ of the ‘nature and cause of the charge against him’’’.[337]

Two international guarantees for the accused must be preserved in the ‘‘determination of any charge’’, including the process of the legal characterization of facts, in international criminal proceedings: the right of the accused to ‘‘be informed promptly and in detail of the nature, cause and content of the charge’’ and the right ‘‘to have adequate time and facilities for the preparation of the defense’’. Regulation 55 ICC Reg. was drafted in the light of these two guarantees.[338]

(i) Legal qualification of facts and the right to be informed promptly and in detail of the nature, cause and content of the charge (art. 67(1)(a) ICC St.)

One may have some doubts whether it is justified to conclude in such abstract and general terms that the introduction of the concept of the legal qualification of facts is incompatible with the right of the accused to be informed ‘‘promptly and in detail’’ of the ‘‘nature and cause of the charge’’. International practice tends to point in a different direction. The concept of the legal characterization of facts is practiced by a large number of European jurisdictions on a regular basis. It has been upheld in principle by the jurisprudence of the ECHR. [339]It is therefore overbroad and

[337] Supra note 323, par. 740

[338] Supra note 318

[339] Both the European Commission on Human Rights and the ECHR have affirmed in constant practice that the right of a criminal chamber to legally re-characterize the facts submitted by the Prosecutor does not per se violate the right of the accused to be promptly informed about the cause and nature of the charges. See ECHR, Daniel Democles v. France, Decision of 24 October 1995, Application No. 20982/92; De Salvador Torres v. Spain, Judgment of 24 October 1996, Application no. 21525/93, par. 33; Pélissier and Sassi v. France, Judgment of 25 March1999, Application no. 25444/94, par. 62 (‘‘The Court accordingly considers that in using the right, which it unquestionably had to re-characterize facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the possibility of exercising their defence rights on that issue in a practical and effective manner, and, in particular, in good time’’). Article 6 (3) (a) ECHR requires only that courts apply the principle of the legal qualification of the facts in a manner which allows the accused to exercise its defence rights ‘‘in a practical and effective manner and, in particular, in good time’’.

somewhat misleading to state that the rights of the accused cannot be satisfactorily safeguarded by ‘‘an approach akin to that of some civil law countries’’.[340]

Regulation 55 ICC Reg. takes into account the right of the accused to be informed promptly and in detail of the nature and cause of the charge, which is enshrined in art. 67(1)(a) ICC St., art. 14(3) ICCPR, art. 6(3)(a) ECHR. The requirements, by which courts are bound, have been elaborated in international human rights jurisprudence. Both the European Commission on Human Rights and the ECHR have found that art. 6(3)(a) ICC St. grants the defendant the right ‘‘to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and inwhich the accusation is based, but also the legal characterization of facts’’.[341] In particular, the Court emphasized that ‘‘in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the Court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair’’.[342] Regulation 55 ICC Reg. addresses these requirements. The text of sub-regulation 2 obliges the TC to inform the participants about a possible legal re-characterization of facts before the adoption of such a change. This condition puts the participants on note and places them in a position to contest the re-characterization of facts by the Chamber, as required by art. 67(1)(a) ICC St. Furthermore, the accused has the opportunity to contest a change in legal qualification through the submission of written observations under sub-regulation 2. This possibility puts the accused in a similar position as in the case of an amendment of the charges under r. 128, sub-rule 2 ICC RPE which provides that ‘‘[b]efore deciding whether to authorize the amendment, the PTC may request the accused and the Prosecutor to submit written observations on certain issues of fact or law’’.[343]

(ii) Legal qualification of facts and the right to have adequate time and facilities for the preparation of the defense (art. 67 (1) (b) ICC St.)

Human rights jurisprudence has also specified that ‘‘the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused’s right to prepare his defense’’. [344] This right is expressly provided for in art. 67(1)(b) ICC St., art. 14(3)(b) ICCPR and art. 6(3)(b) ECHR. It requires the Court to give the accused ‘‘adequate time and facilities for the preparation of the defense’’ in regard to the new legal situation arising out of the re-characterization. According to the European Commission of Human Rights, this means that the accused must have ‘‘the opportunity to organize his defense in an appropriate way and without restriction as to

[340] Supra note 318
[341] See ECHR, Daniel Democles v. France, Decision of 24 October 1995, Application No. 20982/92; De Salvador Torres v. Spain, Judgment of 24 October 1996, Application no. 21525/93; Pélissier and Sassi v. France, Judgment of 25 March1999, Application no. 25444/94, para. 51
[342] Supra note 150, par. 52
[343] Supra note 318
[344] Supra note 150, par. 55

the possibility to put all relevant defense arguments before the trial court''.[345] The accused must be put in a position to contest the legal qualification of facts and to present evidence. Regulation 55 ICC Reg. addresses this concern in several ways. The right of the accused to adequate time and facilities for the effective preparation of his or her defense in the case of a change in legal characterization is expressly reaffirmed in sub-regulation 3(a), which makes a direct reference to art. 67(1)(b) ICC St. This general clarification is complemented by express procedural protections for the accused. Sub-regulation 2 clarifies that the accused may seek a suspension of the hearing if this is necessary for the preparation of the defense, or even a new hearing. Moreover, sub-regulation 3 (b) gives the accused an opportunity to examine again, or have examined again a previous witness, to call new witnesses and to present other evidence admissible under the ICC St. in accordance with art. 67(1)(e) ICC St. Both procedural clarifications ensure that the accused is able to present his or her defense at any stage of the trial proceedings.[346]

Regulation 55 ICC Reg. stipulates that the TC may change the legal characterization of facts "at any time during the trial." The wording implies that there is no temporal limitation to "triggering" this provision since the rights of the accused set forth in paragraphs 2 and 3(a) and (b) ICC Reg. are effectively guaranteed.[347]

It is interesting to note that the ECHR held, in this respect, that recharacterisation following a decision of the first instance court did not violate the applicant's rights where the latter was able to contest the recharacterisation before a higher-instance court which had "thoroughly review[ed]" his case both under "procedural law" and "substantive law".[348]

The Court is called upon to address issues pertaining to the application of art. 67(1)(g) ICC St. when reg. 55 ICC Reg. is triggered. Nevertheless, it has been established that, in the instant case and in light of ECHR case law this right is not being infringed by the use of this procedure. Firstly, it must be recalled that the right not to be compelled to testify against oneself is the corollary of the right to remain silent[349], both of which

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[345] See ECHR, Can v. Austria, Judgment of 30 September 1985, Application no. 9300/81, par. 53

[346] Supra note 318

[347] Supra note 146, par. 15

[348] Supra note 146, par. 16; See While the ECHR held that the accused must be able to submit observations on the legal and factual issues following a legal characterisation of the facts, it did not find that the accused's rights had been violated by a recharacterisation after a conviction by the trial court. In fact, where the applicant was informed and had the opportunity to submit observations on the recharacterisation, the legal recharacterisation of the facts, even at a late stage in the trial, does not necessarily amount to a violation of the accused's rights. ECHR Dallos v. Hungary, Judgment of 1 March 2001, Application no. 29082/95, par. 52 to 53; Sipavičius v. Lithuania, Judgment of 21 February 2002, Application No. 49093/99, par. 26 and 31 to 32; Vesque v. France, Judgment (final) of 3 July 2006, Application no. 3774/02, par. 42 to 43; Pierre Bäckström and Mattias Andersson v. Sweden, Decision on admissibility of 5 September 2006, Application no. 67930/0

[349] ECHR , Saunders v. United Kingdom, Judgment of 17 December 1996, Application no. 19187/91, par. 69

are intimately tied to the presumption of innocence. Hence, the ECHR has repeatedly stated that whilst the right to remain silent and the right not to be compelled to incriminate oneself are not explicitly contained in art. 6 of the Convention, they are nevertheless international standards fundamental to the concept of a fair trial which is enshrined in that article.[350]

2.3.2 Article 74(2) ICC Statute

Two lines of arguments may be made to support the view that the TC is entitled to modify the classification of the offences contained in the charges. One interpretative option is to infer the concept of the legal characterization of facts specifically from the distinction between the charges and ''the facts and circumstances described in the charges'' in art. 74(2) ICC St. and the right of the TC to exercise the powers inherent in its functions. Another possible argument is to derive the right to legally re-classify the facts from the general powers of the TC under art. 64(6) ICC St.[351]

Article 74(2) ICC St. regulates the ''requirements for the decision'' of the TC. It reads: ''The TC's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendment to the charges''. This provision does not contain an express validation of the concept of the legal qualification of facts. But it may be interpreted as an implicit recognition of the possibility for the TC to interpret the facts submitted to it in different legal terms than described in the indictment.[352]

a)Only facts and circumstances in the charges are binding on the TC, but not the legal qualification given to the facts by the Prosecutor

Article 74(2) ICC St. introduces a distinction between ''the charges'' on the one hand, and ''the facts and circumstances described in the charges'', on the other hand. This distinction is unique to Part 6 ICC St. The procedure of the confirmation hearing under Part 5 ICC St. is entirely focused on the concept and the formulation of ''charges''. It forces the Prosecutor to seek an amendment of the charges in the case of a proposed addition or substitution of crimes at the pre-trial stage - with the permission of the PTC after the charges are confirmed art. 61(7)(9) ICC St. Part 6 deploys a different methodology. It places the focus on the TC, by untying the powers of the TC from the tenor of the charges. The distinction between the ''the facts and circumstances described in the charges'' and the charges in the context of Part 6 ICC St. suggests that only facts and circumstances in the charges are binding on the TC,

[350] Supra note 146, par. 47, 48; See, ECHR , John Murray v. United Kingdom, Judgment of 8 February 1996, Application no. 18731/91, par. 45; Serves v. France, Judgment of 20 October 1997, Application no. 20225/92, par. 46; Saunders v. United Kingdom, Judgment of 17 December 1996, Application no. 19187/91, par. 68; Allan v. United Kingdom, Judgment of 5 November 2002, Application no. 48539/99, par. 44; J.B. v. Switzerland, Judgment of 3 May 2001, Application no. 31827/96, par. 64; Chambaz v. Switzerland, Judgment of 5 April 2012, Application no. 11663/04, par. 52

[351] Supra note 318

[352] Supra note 318

but not the legal characterization of these facts by the Prosecutor. This flexibility in interpretation offers the TC the possibility of changing the legal classification of facts.[353]

b) It is possible to change the legal qualification of a crime without changing the charges

To grant the TC the power to change the legal qualification of facts is also in accordance with the conception of the notion of charges under the Statute. It is possible to change the legal characterization of a crime without changing the charges. The charges are composed of two elements: a factual element, the ‘‘statement of the facts, including the time and place of the alleged crimes’’, and a legal element, the ‘‘legal characterization of facts’’ (reg. 52, lit. b ICC Reg.). If a Chamber modifies only the second component, the legal characterization of facts, while basing its assumptions on the facts set out in the charges, it does not automatically amend the charges.[354]

Only the factual allegations which support each of the legal elements of the crime charged qualify as "facts [...] described in the charges", and as such are to be distinguished from "the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (art. 61(5) ICC St.), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged". However useful these "other" facts might have been to the Chamber in determining whether the Prosecutor had presented evidence demonstrating a "clear line of reasoning underpinning [his] specific allegations", and thus meeting the requisite standard of proof under art. 61(7) ICC St., they are, in principle, to be considered only as background information or as indirect proof of the material facts, and as such, are deprived of any limiting power vis-à-vis the TC pursuant to art. 74(2) ICC St. and reg. 55(1) ICC Reg.[355]

In this respect, the Chamber observes that in line with art. 74(2) ICC St. a "charge" is composed of the facts and circumstances underlying the alleged crime as well as of their legal characterization.[356]

In light of the above, the Chamber observes that, among the different facts placed before the Chamber for its consideration, a distinction must be made between the facts underlying the charges - i.e. the "facts described in the charges", which, as such, are the only ones that cannot be exceeded by the TC once confirmed by the PTC- and facts or evidence that are subsidiary to the facts described in the charges, serving the purpose of demonstrating or supporting their existence. Notably, subsidiary facts,

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[353] Supra note 318

[354] Supra note 318

[355] Supra note 286, par. 37; Supra note 33, par. 58

[356] Supra note 33, par. 56

although referred to in the document containing the charges or in the decision on the confirmation of charges, are of relevance only to the extent that facts described in the charges may be inferred from them.[357]

Under art. 74(2) ICC St., the Chamber is prohibited from exceeding the facts and the circumstances described in the charges, but it may give them a different legal characterization if it considers it necessary to assess them differently, in accordance with reg. 55 ICC Reg.[358]

2.3.3 Article 64 (6) lit (f) ICC Statute

A second provision which indicates that a TC may be entitled to adopt the principle of the legal characterization of facts in practice is art. 64(6) lit (f) ICC St. It states: ‘‘In performing its functions prior to trial or during the course of a trial, the TC may, as necessary [...] [r]ule on any other relevant matters’’. This provision was inserted in order to grant the judges the possibility to adapt their practice ‘‘to the configuration of the trial before them’’.[359] It allows the judges, in particular, to issue practice directions to the parties in areas where the text of ICC St. is silent. Article 64(6) lit (f) ICC St. could arguably also serve as a basis to justify the adoption of the principle of the legal characterization of facts in the jurisprudence of the Court.[360]

2.3.4 Article 52 ICC Statute

Article 52 ICC St. authorizes the judges of the Court to adopt regulations for the ‘‘routine functioning’’ of the Court. This provision entrusts judges with a mandate (‘‘shall’’) to elaborate provisions relating to the judicial proceedings before the Court. The term ‘‘routine functioning’’ itself is not further defined in the ICC St. or the ICC RPE[361]. Article 52 ICC St. must be read in conjunction with art. 4 ICC St., which gives the Court the powers necessary for the exercise of its functions. But it is broad enough to allow for the adoption of regulations which clarify elements of the trial procedure or provide the capacity to function effectively as a Court, including a norm on the treatment of the legal characterization of facts. [362]

3.3.5 Implied powers

Finally, one may argue that the principle of the legal qualification of facts is covered by the concept of implied powers. The ICC Reg. are not only an instrument to

[357] Supra note 33, par. 59

[358] ICC, TC II, Situation in the Democratic Republic of Congo, in the case of the Prosecutor v. Germain Katanga nad Mathieu Ngudjolo Chui, Decision on the Filing of a Summary of the Charges by the Prosecutor, ICC-01/04-01/07- 1547

[359] See Frank Terrier, Powers of the Trial Chamber, in The Rome Statute Of The International Criminal Court: A Commentary, Antonio Cassese et al., Vol. II, eds. 2002

[360] Supra note 318

[361] The Report of Judges on the Regulations defines ‘‘routine functioning’’ as encompassing ‘‘every step, deed or action that is incidental to the invocation and exercise of the Court’s jurisdiction’’

[362] Supra note 318

streamline proceedings, but also a mechanism to enable the Court to exercise its powers effectively. The TC will have to deal with situations in which the facts establish at the trial stage that a different crime or a different sub-category of crime has been committed. The possibility of changing the legal characterization of facts may, in such circumstances, be a power necessary for the TC to effectively perform its functions under art. 64 ICC St.[363]

[363] Supra note 318

CHAPTER II: AUTHORITY TO CHANGE THE LEGAL CHARACTERIZATION OF FACTS TO ACCORD WITH ''THE FORM OF PARTICIPATION OF THE ACCUSED UNDER ARTICLES 25 AND 28'' OR WITH ''THE CRIMES UNDER ARTICLES 6, 7, 8''

1. A change in the form of the perpetration of the crime under article 25(3)- Katanga, Ruto case and in the form of the responsibility of commanders and other superiors under article 28- Gombo case

1.1 The Prosecutor v. Germain Katanga

On 26 September 2008, the PTC I rendered the CD of charges. In that decision, it found that there was sufficient evidence to establish substantial grounds to believe that during the attack on Bogoro on 24 February 2003, Germain Katanga and Mathieu Ngudjolo jointly committed through other persons, within the meaning of art. 25(3)(a) ICC St., willful killing constituting a war crime (art. 8(2)(a)(i) ICC St.); murder constituting a crime against humanity (art. (7)(1)(a) ICC St.); the war crime of directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities (art. 2(b)(i) ICC St.); the war crime of destroying property (art. 8(2)(b)(xiii) ICC St.); the war crime of pillaging (art. 8(2)(b)(xvi) ICC St.); sexual slavery constituting a war crime (art. 8(2)(b)(xxii) ICC St.) and a crime against humanity (article 7(1)(g) of the Statute); the crime of rape constituting a war crime (art. 8(2)(b)(xxii) ICC St.) and a crime against humanity (art. 7(1)(g) ICC St.).[364]

The presentation of evidence for the confirmation of charges began on 25 November 2009 and ended on 11 November 2011.[365] The Office of the Prosecutor called 24 witnesses, and two victims were called to appear at the request of the Legal Representative of the main group of victims. The Defence for Germain Katanga called 17 witnesses. The Chamber itself called two witnesses. [366] Once the various testimonies had been heard, the two Accused gave evidence as witnesses in their turn.

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[364] Supra note 30

[365] See also ICC, TC II, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on three applications seeking the production of additional evidence and on an agreement as to evidence, ICC-01/04-01/07-3217-Conf. On 18 and 19 January, the Chamber undertook a judicial visit to the DRC in the presence of the parties, participants and representatives of the Registry of the Court. ICC, TC II, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on a judicial site visit to the Democratic Republic of the Congo, ICC-01/04-01/07-3203

[366] ICC, TC II, Situation en République Démocratique du Congo Affaire le Procureur v. Germain Katanga, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436, par. 21; See also ICC, TC II, Situation en République Démocratique du Congo Affaire le Procureur v. Germain Katanga, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436-AnxC

The presentation of evidence was declared officially closed on 7 February 2012.[367] Totally, the OTP has adduced 261 pieces of evidence and the Defence of Germain Katanga 240 pieces of evidence. Five pieces of evidence have been adduced by the Chamber and five more from Victims, totally amounted on 643 pieces of evidence presented during the proceedings.[368]

As the Appeals Chamber has suggested,[369] it is for the chambers, guided by the sole concern of determining the truth of the charges referred to them, having considered the evidence admitted into the record of the case, to reach a decision on the guilt of the accused,[370] without necessarily restricting themselves to the characterisation employed by the Pre-Trial Chamber and on which the Prosecutor has elaborated during the trial. It is also for the chambers to judge and state if the most suitable response to the charges referred to it is to apply this provision. It is precisely with this in mind that the Majority has objectively examined all evidence relating to Germain Katanga's role and taken the view that it is appropriate to propose a re-characterisation in the instant case.[371]

Upon examining the evidence, it appeared to the Majority of the Chamber, Judge Van den Wyngaert dissenting on this point, that Germain Katanga's mode of participation could be considered from a different perspective from that underlying the CD and it was therefore appropriate to implement reg. 55 ICC Reg. while ensuring that the Defence is able to exercise its rights effectively, in accordance with reg. 55(2) and 55(3) ICC Reg. Regulation 55(2) ICC Reg. provides that the Trial Chamber shall give notice to the participants of the possibility that the legal characterisation of facts may be subject to change "having heard the evidence". Accordingly, the Majority informed the parties and participants that the legal characterization of facts relating to Germain Katanga's mode of participation is likely to be changed and that the

[367] ICC, TC II, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Déclaration de la clôture de la présentation des moyens de preuve, ICC-01/04-01/07-3235

[368] Supra note 366, par. 22

[369] Supra note 317, par. 77

[370] In the view of the AC, "[w]hile mindful that the Prosecutor bears the onus of proving the guilt of the accused, it is nevertheless clear that 'the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth' (article 69 (3) of the Statute). The fact that the onus lies on the Prosecutor cannot be read to exclude the statutory powers of the court, as it is the court that 'must be convinced of the guilt of the accused beyond reasonable doubt' (article 66 (3) of the Statute)." ICC, AC, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, par. 95. See also ICC, TC II, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Defence for Germain Katanga's Additional Observations on Victims' Participation and scope thereof, ICC-01/04-01/07-1618

[371] Supra note 146, par. 8

accused's responsibility must henceforth also be considered having regard to another paragraph of art. 25(3) ICC St.[372]

The PTC stated that Germain Katanga served as de jure supreme commander of the FRPI commanders; that the FRPI was a hierarchically organized group; that compliance with Germain Katanga's orders was ensured; and that Germain Katanga played an essential role resulting in the realization of the objective elements of the crime, in this case, the implementation of a common plan aimed at "wiping-out" Bogoro and the Hema civilians there. The recharacterisation contemplated by the Majority under art. 25(3)(d)(ii) ICC St. considered that Germain Katanga contributed in another way to the commission of crimes by a group of Walendu-Bindi commanders and combatants acting with a common purpose to attack Bogoro on 24 February 2003. The recharacterisation further considered that the accused's contribution was intentional and made with full knowledge of the group's intention to commit the crimes.[373]

In the view of TC II, Mr Katanga's liability should have been considered on the basis of art. 25(3)(d) ICC St. (complicity in the commission of a crime by a group of persons acting with a common purpose) and no longer solely on the basis of art. 25(3)(a) ICC St. (commission of a crime in the form of indirect co-perpetration). The Majority would not examine the crime of using children under the age of fifteen years to participate actively in hostilities (direct co-perpetration) in the light of art. 25(3)(d) ICC St. .[374]

The Chamber further highlighted that in making submissions, the Prosecutor is in no wise authorized to seek to introduce new evidence on the proposed alternative mode of liability. The Majority considered that, in this instance, granting this opportunity anew would be to afford her an undue advantage. It recalls that the Prosecutor has already had the opportunity to present evidence pertaining to the facts and circumstances described in the charges and that these facts and circumstances are not subject to change in the proposed recharacterisation.[375]

Nonetheless, the Majority had to decide whether it is possible, having regard to its particular circumstances, to apply reg. 55 ICC Reg. with regard to mode of responsibility previously cited, without infringing the rights of the accused as, inter alia, set out in art. 67 ICC St. The AC has moreover held that the manner in which safeguards to protect the rights of the accused are applied would depend on the specific circumstances of the case.[376]

[372] Supra note 146, par. 6
[373] Supra note 146, par. 25,26
[374] Supra note 146, par. 6
[375] Supra note 146, par. 56
[376] Supra note 146, par. 13

The parties to the case were fully aware of the existence of reg. 55 ICC Reg. insofar as, firstly, it was mentioned in the aforementioned 21 October 2009 Decision on the Filing of a Summary of the Charges by the Prosecutor.[377]

In the view of the Majority, nothing could preclude the Chamber from implementing reg. 55 ICC Reg. at the deliberation stage. Nonetheless, such implementation does not prejudice the accused's full and free exercise of his rights under art. 67(1)(a)(b) and (c) ICC St. in this case and in the particular circumstances of this case. [378]

Indubitably, legal recharacterisation of the facts at the deliberation stage may raise concerns about an appearance of partiality on the part of the judges who may be thought to be already convinced of the accused's guilt, or to be seeking to establish it at all costs. Nonetheless, any such concerns should, in any event, be objectively justified in light of the particular circumstances of the case.[379] The Majority cannot be accused of lacking impartiality. Admittedly, the Chamber's deliberations on the accused's initial mode of liability under art. 25(3)(a) ICC St. is already well under way. Moreover, the Majority's decision to consider a legal recharacterisation of the facts regarding Germain Katanga was based on a thorough review of the evidence in the case.[380]

In this instance, it must be noted that the legal characterisation proposed by the Majority, to determine the responsibility of the accused on the basis of the mode of complicity defined in article 25(3)(d)(ii), precisely reflects the facts described in the CD, scilicet, in this case, the substantiating legal elements underlying the charges confirmed against Germain Katanga, who had the opportunity to defend each of these facts during the trial. The Majority emphasized that the recharacterisation contemplated by way of reg. 55 ICC Reg. and under art. 25(3)(d)(ii) ICC St.would, in any event, relate to the attack on Bogoro on 24 February 2003 and on the crimes set out in the PTC's Decision. It would also result in the analysis of the role played by the group of Ngiti combatants based in Walendu-Bindi collectivité, as set out by the afore-mentioned Decision. This recharacterisation should also pertain to local

[377] ICC, TC II, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Filing of a Summary of the Charges by the Prosecutor, ICC-01/04-01/07-1547

[378] Supra note 146, par. 20

[379] ICTY, AC, Prosecutor v. Furundžija, Appeal Judgement, Case no. IT-95-17/1, 21 July 2000, par. 185 and 189; ICTR, TC, Prosecutor v. Charles Sikubwabo, Decision on the Prosecutor's Request for Referral of the case to the Republic of Rwanda Rule 11bis of the Rules of Procedure and Evidence, Case No. ICTR-95-1D-R11bis, 26 March 2012, para. 124; ECHR, Morel v. France, Judgment of 6 June 2000, Application No. 34130/96, par. 42, 44 to 45; Castillo Algar v. Spain, Judgment of 28 October 1998, Application No. 28194/95, par. 45, based on the "actual facts"; Fey v. Austria, Judgment of 24 February 1993, Application No. 14396/88, par. 30, based on the "actual facts"; Bulut v. Austria, Judgment of 22 February 1996, Application No. 17358/90, par. 31, to "ascertain whether the [tribunal] offered guarantees sufficient to exclude any legitimate doubt in this respect"; Piersack v. Belgium, Judgment of 1 October 1982, Application No. 8692/79, par. 30, "to determine whether he [the judge] offered guarantees sufficient to exclude any legitimate doubt in this respect"

[380] Supra note 146, par. 19

commanders who were members of that group, as described in the PTC's Decision, and to Germain Katanga's contribution which led to the realization of the objective elements of the crime.[381]

The legal characterization proposed, in the view of the Majority, therefore seek to limit Germain Katanga's liability only to facts and circumstances already contained in the CD, and thereby fulfilled the requirements of reg. 55(1) ICC Reg. and ensured full respect for the rights guaranteed by art. 67(1)(a) ICC St.[382]

In the case at bar, the Majority was aware that triggering reg. 55 ICC Reg. at this stage of the proceedings will prolong the proceedings against Germain Katanga. However, it cannot be said that triggering this regulation would automatically infringe the right of the accused to be tried without undue delay. Majority was satisfied that it is possible to enable the accused to prepare an efficient and effective defense under reg. 55(3) ICC Reg., without prolonging the proceedings such as to entail an undue delay. As attested to by the present decision, the Majority felt the need to provide Germain Katanga with certain information in order to facilitate the preparation of his defense on the basis of art. 25(3)(d) ICC St. [383]

By majority, the TC II decided to trigger reg. 55 ICC Reg., notified the parties and participants that the mode of liability under which Germain Katanga stands charged is subject to legal recharacterisation on the basis of art. 25(3)(d) ICC St. and invited the Defense, the Prosecutor and the Legal Representatives of Victims to file the submissions.[384]

The Decision of TC II was rendered on 21 November 2012, after the TC II had begun its deliberations on Mr Katanga's guilt or innocence. This was more than one year after the last evidence was presented (11 November 2011),[385] and several months after the formal close of the evidence (7 February 2012) and the hearing of closing statements (15 to 23 May 2012).[386]

The AC determined whether, at that stage of the proceedings, it was in principle lawful, pursuant to the terms of reg. 55 ICC Reg., to give notice to the participants that the legal characterization of facts may be subject to change. The AC therefore had

[381] Supra note 146, par. 22,23,27
[382] Supra note 146, par. 34
[383] Supra note 146, par. 44
[384] Supra note 146; See also Dissenting Opinion of Judge Christine Van Den Wyngaert
[385] ICC, TC II, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Trial Hearing, ICC-01/04-01/07-T-333-Red2-ENG CT2
[386] ICC, TC II, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Closing Statements, ICC-01/04-01/07-T-336-ENG to ICC-01/04-01/07-T-340-ENG

to review whether the TC erred in relation to whether "it appears [...] that the legal characterisation of facts may be subject to change", pursuant to reg. 55(2) ICC Reg.[387]

Pursuant to reg. 55 (2) ICC Reg., notice of a possible re-characterization may be given "at any time during the trial". The AC observed that, at the time the Decision of TC II was rendered, the trial was at the deliberations stage and that no decision under art. 74 ICC St. had yet been rendered. Furthermore, nothing in ICC St., ICC RPE or ICC Reg. prevents the TC from re-opening the hearing of evidence at the deliberations stage of the proceedings. The AC therefore concluded that, for the purposes of reg. 55 ICC Reg., the trial was ongoing at the present time. The timing of the TC II Decision was therefore not incompatible with reg. 55 ICC Reg. The AC was not persuaded by Mr Katanga's argument that there is an unspecified temporal limit as to when notice of a possible re-characterization can be given by the TC under reg. 55(2) ICC Reg. The AC considered, as was pointed out by the Prosecutor, that the reference to the "appropriate stage of the proceedings" related to the opportunity to be given to the participants to make oral or written submissions. In other words, the participants must be given an opportunity to make submissions at an appropriate stage of the proceedings, following notice of a possible re-characterization, but this does not limit the TC's power to give such notice "at any time during the trial". As to Mr Katanga's argument that the phrase "and having heard the evidence" within the first sentence of reg. 55(2) ICC Reg. suggests that notice must be given before the conclusion of the evidence, the AC accepted that this is a possible reading of that sentence. However, for the reasons set out below, and having regard to the regulation as a whole, the AC was not persuaded by this argument.[388]

The last sentence of reg. 55(2) ICC Reg. provides that the TC may, when considering a possible change in the legal characterization of facts and having given notice, either suspend the hearing or, "if necessary", "order a hearing to consider all matters relevant to the proposed change". The AC interpreted this to mean that the hearing may be suspended to enable effective preparation if notice is given during a hearing; but that there is also provision for a hearing to be ordered "if necessary", which implies that notice can be given, inter alia, after the hearing of evidence has been concluded, such as at the deliberations stage. The AC therefore concluded that, while it is preferable that notice under reg. 55(2) ICC Reg. should always be given as early as possible.[389]

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[387] ICC, AC, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", ICC-01/04-01/07-3363, par. 15, 46

[388] Supra note 387, par. 19

[389] Supra note 387, par. 23, 24

On an appeal pursuant to art. 82(1)(d) ICC St., the AC may confirm, reverse or amend the decision appealed (r. 158(1) ICC RPE). In the present case, for the reasons given above, it is appropriate to confirm the TC II Decision.[390]

As there was no reliable evidence that Germain Katanga played any role in the execution of the attack of the 24th, much less in any of the crimes that were committed in Bogoro on that day,[391] his potential criminal responsibility under article 25(3)(d)(ii) is inevitably tied to what he may have done in support of the attack before it took place.[392]

Neither the ICC St. nor the ICC RPE prevents the reliance on indirect evidence. In view of the evidence, only one reasonable conclusion can be drawn from particular facts, as the Chamber found that the evidence for the conviction of an accused has to establish a standard beyond a reasonable doubt.[393] When it comes to deciding about the guilt or innocence of the accused, the only question that a Trial Chamber must address is whether, on the evidence adduced at trial, the charges as confirmed by the Pre-Trial Chamber (or, in appropriate cases, as modified by the Trial Chamber under regulation 55) have been established beyond a reasonable doubt.[394]

The Trial Chamber with its relative decision "Decision on the Bar Table Motion of the Defence of Germain Katanga"[395] granted the Bar Table Motions in respect of the following items of evidence, relying on First Bar Table Motion[396] and on the amendment of the First Bar Table Motion[397] by adding the manuscript letter "Ujuli sho"[398] and its translation[399] to the Defence List of Evidence: **Category 1 consists of 14 United Nations reports:** DRC-OTP-0061-0381 (The UN MONUC Daily Sitrep 667 of 14 May 2002), DRC-OTP-0004-0292 (The UN MONUC Daily Sitcen Mission Report of 2 March 2004), DRC-OTP-0195-1513 (Bunia SITREP 20 June 2003), DRC-OTP-1029-0634 (Outgoing Code Cable of 18 August 2003), DRC-D02-0001-0199 (UNICEF in emergencies - Children and armed conflict); **Category 2 consists of two Certificates:** DRC-D02-0001-0469 (Diploma of radio operator Mike 4), DRC-OTP-1057-0087 (Marriage certificate of ODHARO OMBILI Nziri); **Category 3**

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[390] Supra note 387, par. 106
[391] Supra note 366, par. 752
[392] Supra note 156, par. 6
[393] Supra note 366, par. 109; Supra note 16, par. 111 ; ICC, AC, Situation in Darfur, Sudan in the case of the Prosecutr v. Omar Hassan Ahmad Al Bashir, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-73, para. 33.
[394] Supra note 156, par. 7
[395] ICC, TC II, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Bar Table Motion of the Defence of Germain Katanga, ICC-01/04-01/07-3184
[396] ICC, TC II, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga, "Defence Bar Table Motion", ICC-01/04-01/07-3133-Conf, par. 1-3
[397] ICC-01/04-01/07-3159-Conf
[398] DRC-OTP-0029-0109
[399] DRC-OTP-1024-0091

consists of three Prosecution Investigators' Reports: DRC-OTP-1029-0678 (Investigator's Note on W-280), DRC-OTP-1023-0073, DRC-OTP-0029-0109, DRC-OTP-1024-0091.[400]

Similarly, the TC II with its relative decision "Decision on the Prosecutor's Bar Table Motions"[401] granted the Bar Table Motions in respect of the following items of evidence, relying on the First Motion[402] and Second Motion[403]: **Category 1 comprises eight United Nations Security Council resolutions:** DRC-OTP-0131-0144, DRC-OTP-0131-0149, DRC-OTP-0131-0153, DRC-OTP-0131-0167, DRC-OTP-0131-0410, DRC-OTP-0131-0413, DRC-OTP-0154-0671, DRC-OTP-1013-0304; **Category 2 comprises ten reports from various United Nations ("UN") agencies:** CAR-OTP-0005-0074; **Category 3 comprises 23 reports from the United Nations Organization Mission in the Democratic Republic of the Congo ("MONUC"):** DRC-OTP-0005-0012, DRC-OTP-0005-0033, DRC-OTP-0005-0276, DRC-OTP-0009-0015, DRC-OTP-0009-0372, DRC-OTP-0011-0452; **Category 4 comprises ten reports from various non-governmental organisations ("NGOs"):** DRC-OTP-0163-0357; **Category 7 comprises five videos from MONUC, the Congolese Ministry of Human Rights and a private individual:** DRC-OTP-0124-0008, - DRC-OTP-1048-0663, - DRC-OTP-1048-0674 (transcript and translation); **Category 8 comprises 11 court documents from other jurisdictions, including the International Court of Justice, the courts of the Democratic Republic of the Congo ("the DRC") and the Etat-major général du FRPI:** DRC-OTP-0138-0236, DRC-OTP-0138-0780, DRC-OTP-0141-0349, DRC-OTP-0180-0656 (The International Court of Justice judgment in the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) of 19 December 2005); **Category 9 comprises 30 documents from various sources: - A letter signed by a group of detainees including Mr Katanga:** DRC-OTP-0172-0007, DRC-OTP-0172-0005 **- An invitation signed by Colonel Ngudjolo on behalf of the FRPI:** DRC-OTP-0136-0068 **- Two handwritten letters allegedly from Floribert Ndjabu Ngabu, acting on behalf of the FNI:** DRC-OTP-1012-013, DRC-OTP-1012-0134 (The handwritten report dated 18 June 2007 which does not mention its author but was allegedly signed by Floribert Ndjabu Ngabu) **- A document allegedly from the Presidency of the FNI/FRPI:** DRC-OTP-0138-0239 (Lettre Perception taxes d'or) -**A number of invitations allegedly from Mr Katanga, signing as President of the FRPI:** DRC-OTP-0028-0463 **- A letter allegedly from**

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[400] ICC, TC II, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Bar Table Motion of the Defence of Germain Katanga, ICC-01/04-01/07-3184, par. 11

[401] Supra note 89

[402] ICC, TC II, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Prosecution's Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, ICC-01/04-01/07-2290

[403] ICC, TC II, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Prosecution's Second Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, ICC-01/04-01/07-2623-Conf

Mr Katanga, signing as President of the FRPI: DRC-OTP-0028-0356 **- A letter allegedly from a representative of a religious organisation addressed to Colonel Katanga:** DRC-OTP-0029-0046 **- A letter allegedly from Justin "Cobra" Matata Banaloki:** DRC-OTP-0029-0072 **- A political declaration allegedly from the PUSIC Political Commissioner:** DRC-OTP-0041-0104 **- A joint communiqué, allegedly signed by Mr Ngudjolo as Chief of Staff of the FRPI:** DRC-OTP-0132-0245 **- A Presidential Decree nominating Mr. Germain Katanga and others to the rank of 'Général de Brigade', dated 11 December 2004:** DRC-OTP-0086-0036 (The Presidential Decree nominating Mr. Germain Katanga and others to the rank of 'Général de Brigade', dated 11 December 2004) **- A report by the 'Organe Exécutif Intérimaire à VAssemblée Spéciale Intérimaire de VIturi', dated November 2003:** DRC-OTP-0091-0218 **- A political agreement between several political and armed groups in Ituri, allegedly signed by a number of FNI/FRPI representatives:** DRC-OTP-0136-0171.

In both Defence[404] and OTP[405] Bar Table Motions the TC II has also excluded evidence on the basis of lack of relevance, probative value and authentication.

- Right to be informed of the charges and to have adequate time and facilities for the preparation of the defence (article 67(1)(a) and (b))

a) Timing of notice under regulation 55

Although the Chamber's decision to give notice under regulation 55(2) is discretionary, the Chamber is under an ongoing obligation to remain vigilant in considering whether to trigger regulation 55. The Majority had two and a half years of trial during which they could have provided Germain Katanga with reasonable notice that the charges 'may' be subject to change. This is particularly so in light of the fact that the Defence on several occasions requested additional clarifications of the Document Containing the Charges, in particular regarding the alleged co-perpetrators of Germain Katanga,[406] challenged the mode of liability, but also made the Defence

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[404] ICC, TC II, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Bar Table Motion of the Defence of Germain Katanga, ICC-01/04-01/07-3184, par. 16-20

[405] Supra note 89, par. 16-36

[406] ICC, PTC I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Defence Motion seeking the Amendment of the Document containing the Charges, ICC-01/04-01/07-574; ICC, PTC I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Defence Reply to Prosecution's Consolidated Response to the Defences' Motions Regarding the Document Containing the Charges, ICC-01/04-01/07-620; ICC, PTC I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Defence Application for an Amended Document Containing the Charges, ICC- 01/04-01/07-954; ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Renewed Application by the Defence for Germain Katanga for a New Amended Document Containing the Charges, ICC-01/04-01/07-1310; ICC, PTC I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,

position clear through statements, submissions and questions. On no occasion was any issue raised by the Prosecutor, the co-accused, the OPCV, or the Chamber relating to an alternative form of personal liability.[407]

If the Majority can argue that the Defence should have been able to foresee an article 25(3)(d)(ii) recharacterisation, then it seems equally reasonable that the Majority should have been able to foresee this possibility as well and given notice at a point that would have respected the rights to have adequate time and facilities for the preparation of the defence pursuant to article 67(1)(b) and regulation 55(3)(a), and to have witnesses examined pursuant to article 67(1)(d) and regulation 55(3)(b). Considering how late the notification was given, it was therefore of the utmost importance that, when it came, it would be as complete and detailed as possible. Indeed, it was only after being admonished by the Appeals Chamber[408] that the Majority acknowledged the need to provide considerable further clarifications in order to permit the Defence to defend itself effectively.[409] However, the Majority's Further Notice Decision fell far short in this regard. [410]

b) Need to provide detailed information

It is beyond dispute that article 67(1)(a) and (b) require that the Defence is given detailed information about the charges. On 13 March 2009, more than eight months

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Defence Observations on a 'Summary Document Reflecting the Charges', ICC-01/04-01/07-1509; ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Décision relative au dépôt d'un résumé des charges par le Procureur, ICC-01/04-01/07-1547; ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Defence Observations on the Summary of Charges and Request for Clarification and or an extension of time, ICC-01/04-01/07-1601; ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Defence Observations on the Document Summarising the Charges, ICC-01/04-01/07-1653; ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Defence Request for Leave to Appeal the Trial Chamber's Oral Decision of 23 November 2009 on the Defence Request for Clarification of the Charges, ICC-01/04-01/07-1690; ICC,TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,Décision relative à la demande d'autorisation d'appel contre la décision orale de la Chambre de première instance II du 23 novembre 2009 relative à la notification des charges", ICC-01/04-01/07-2213

[407] Supra note 156, par. 62, 63

[408] Supra note 387, par. 102. Judge Tarfusser also found in his dissent that the Impugned Decision fell "largely short of providing an adequate amount of information to the accused". Judge Tarfusser emphasised that the Majority on Appeal had itself explicitly admitted that it "neither knows the precise nature of the recharacterisation that may be made nor the evidence on which the Trial Chamber may rely in relation thereto", para. 24 referring to the Majority view in the Katanga Regulation 55 Appeals Decision, para. 95

[409] ICC, TC II, Situtation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga, Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court", 15 May 2013, ICC-01/04-01/07-3371-tENG, par. 9. See also Dissenting Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3371-Anx, par. 10 – 20

[410] Supra note 156, par. 66, 67

before the start of the trial, the Trial Chamber required the Prosecutor to submit an in depth analysis chart to the Defence prior to the start of trial detailing how each piece of the Prosecution evidence related to each of the charges levelled against the accused. The Chamber further agreed with the Defence that it is entitled to be informed – sufficiently in advance of the commencement of the trial – of the precise evidentiary basis of the Prosecution case. Indeed, although the Prosecution rightly asserts a great level of discretion in choosing which evidence to introduce at trial, the Defence must be placed in a position to adequately prepare its response, select counter-evidence or challenge the relevance, admissibility and/or authenticity of the incriminating evidence. This is only possible if the evidentiary basis of the Prosecution case is clearly defined sufficiently in advance of trial.[411] It would of course have been difficult for the Majority to ask the Prosecutor to submit a new document containing the charges under article 25(3)(d)(ii) at the end of the trial. Doing so would have given the Prosecutor an unfair advantage. According to Minority Opinion, it is not appropriate to argue that, because the accused is aware of everything that was presented at trial, he or she therefore has notice of everything.[412] Charges are more than a list of isolated facts and a list of legal elements. Instead, charges are allegations about the existence of specific relations between evidence and factual propositions on the one hand, and between those several factual propositions on the other. Together, they are claimed to demonstrate a particular narrative which, if true, would cover all the legal elements of the charges with which it corresponds.[413]

c) Inadequate notice

Moreover, the Majority's argument that it did not have to provide detailed notice of the new charges under article 25(3)(d)(ii) because they are based on the same 'facts and circumstances' as the charges under article 25(3)(a) fails. Even when the Majority purported to provide the Defense with further information, it remained exceedingly vague.[414]

Be that as it may, the most fundamental problem with regard to the lack of notice is that the Majority never informed the Defense of the precise evidentiary basis of the charges under article 25(3)(d)(ii). [415]Why the accused should not be entitled to the

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[411] ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", ICC-01/04-01/07-956, par. 5, 6

[412] Supra note 366, par. 1520

[413] Supra note 156, par. 68, 71, 72

[414] Supra note 156, par. 75, 76; Supra note 409, par. 19

[415] Although regulation 52 of the Regulations of the Court does not specify that the Document Containing the Charges should include references to the supporting evidence, I note that all Chambers in all cases have required the Prosecutor to provide the Defence with either a document or a table indicating precisely upon which evidence she relies in order to prove her allegations. This requirement has been applied also when the charges are amended (see, for example, ICC, PTC I, Situation in the Republic of Côte d'Ivoire, Prosecutor v. Laurent Gbagbo, "Decision adjourning the hearing on the

same in cases when the charges are re characterized, especially at the end of the trial, when the Trial Chamber knows exactly which evidence is available in the case record.[416] In response to repeated requests by the Defense in this regard, the Majority laconically stated: as to the list of evidence to which it will refer, the Chamber considers that at this juncture, the Defence could not have been unaware of that evidence and therefore the Bench had no need to provide it. The Majority also rejected the Defence's request to be informed of how it evaluated the credibility of the evidence by stating that the Defence had no right to know what the Chamber thought about the evidence before the judgment was pronounced.[417]

The Defence was aware of the evidence in the case. However, the Defence was also aware of the fact that the Majority clearly did not believe a considerable portion of this evidence, otherwise it would not have taken the step to recharacterise the charges to begin with. Accordingly, as the Defence was not informed about which parts of the Prosecutor's evidence the Majority was still considering relying upon, the Defence was left guessing about which evidence it had to challenge in order to defeat the article 25(3)(d)(ii) charges. More importantly, the Defence could not possibly have foreseen how the Majority would use its own evidence, as well as that of the co-accused – which was presented to disprove the charges under article 25(3)(a) – in order to prove the charges under article 25(3)(d)(ii). The significance of this point can be seen from the fact that the Majority relied heavily on several Defence witnesses and exhibits, such as D02-148, D03-88, the "Lettre de doléances", as well as Germain Katanga's own testimony.[418]

- Failure to afford a reasonable opportunity to investigate (article 67(1) (b) and (e))

An additional investigation into a number of key factual issues was more than necessary. In the 15 May 2013 Decision, the Chamber accepted that, although addressed at trial, some topics were of particular salience to the analysis of Germain Katanga's liability under article 25(3)(d)(ii) of the Statute. The Chamber considered this to hold particularly true for (1) the attack on Nyankunde and/or other attacks predating the attack on Bogoro; (2) the identification of the perpetrators of the crimes; and (3) the nexus between the weapons supplied to the Ngiti combatants and the crimes committed in Bogoro. In principle, therefore, the Chamber is agreeable to further investigations by the Defence for the purposes of a final list of those witnesses whom it intends to recall or call for the first time.[419]

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confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", ICC-02/11-01/11-432, (c)(ix) of the operative part

[416] Supra note 156, par. 75, 76; Supra note 409, par. 81

[417] Supra note 366, par. 1524

[418] Supra note 156, par. 83

[419] ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga, Decision on the Defence Requests set forth in observations 3379 and 3386 of 3 and 17 June 2013, ICC-01/04-01/07-3388-tENG, par. 17-18

Even if regulation 55 does not give the Defence an unfettered right to conduct unlimited investigations[420] this particular case it was absolutely clear that, in order to maintain some level of fairness and balance in the proceedings, the Defence had to be able to conduct a meaningful investigation. The mere existence of regulation 55 cannot impose a burden upon the Defence to investigate all possible facts and circumstances contained in the Confirmation Decision, just in order to be prepared for the eventuality that the Chamber might at some point decide to re characterize the charges. Accordingly, if the Defense can identify particular factual issues which it did not previously investigate – without having been negligent in this regard – and it is clear that these issues have a particular significance in the context of the re characterized charges, then the Defense should, as a matter of principle, be given a meaningful and realistic opportunity to investigate these issues.[421]

The fundamental flaw in the Majority's reasoning lies in the fact that they seem to argue that further investigations are only "necessary" under regulation 55(3) when they will result in new information that may have an impact on the outcome of the proceedings. However, this is a crucial misconception of what this provision means. Accordingly, even if the investigations yield no useful new evidence whatsoever, this does not mean – even with hindsight - that they were not necessary. Arguing otherwise would imply that Defence investigations are always a waste of time when the accused is convicted in the end.[422]

a)The Defence did not have a meaningful opportunity to investigate

Had notice been given at any point during trial, or even for much of 2012, the Defence would have had a reasonable opportunity to carry out further investigations. However, the Chamber did not authorise the Defence to conduct further investigations until 26 June 2013.[423] A Registry Report attested to the fact that investigations could have been undertaken up until August 2013, but corroborated the Defence's contention that the security situation prevented investigations thereafter.[424] It cannot therefore reasonably be argued that there was sufficient opportunity between 26 June 2013 and August 2013 for the Defence to reassemble their small investigatory team, travel to Ituri and conduct meaningful investigations on broad topics over an expansive geographical area.[425]

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[420] Supra note 366, par. 1553

[421] Supra note 156, par. 89, 90

[422] Supra note 156, par. 92; Supra note 366, par. 1584

[423] See also, ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga, Décision portant rappel des termes de la décision n° 3406 du 2 octobre 2013 et de l'Ordonnance n° 3412 du 10 octobre 2013, ICC-01/04-01/07-3419, par. 11

[424]ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga , Observations du Greffe en application de la Décision, ICC-01/04-01/07-3398

[425] Supra note 156, par. 103; ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga , Defence Further Report on the Security Situation in Eastern DRC, ICC-01/04-01/07-3427, par. 3

Had the Judges of the Majority provided proper and detailed notice on 21 November 2012 and immediately authorised the Defence to conduct additional investigations, it would not have been necessary to wait almost another half year before providing the Defense with further details about the new charges in the Further Notice Decision.[426] As the Majority failed to provide sufficient specificity in November 2012, the Defense was then necessarily placed in a position of having to seek further information, which it did on 15 April 2013, requesting that the Chamber provide further and better notice of the "facts and circumstances" that may be relied upon if the Chamber was minded to contemplate altering the mode of liability.[427] Unfortunately, the Majority's factual exposition in paragraphs 18-25 of the Further Notice Decision of 15 May 2013 also provided insufficient detail in order to allow Germain Katanga an adequate opportunity to defend himself against these allegations formulated under article 25(3)(d)(ii), thereby causing further, avoidable, delays.[428]

b) There were no meaningful alternatives, short of fresh investigation

Throughout the Majority's Opinion on regulation 55, there is a string of reproaches to the Defence, accusing the latter of not having made full use of the alternative means to defend the accused, short of investigating, that were available to it.[429]

The Majority seems to make much of the fact that it allowed the Defence to make submissions based on the existing evidence in the case record. The Majority had – as a matter of principle – accepted the need for new investigations on 26 June 2013[430], but then changed its previous position by compelling the Defence to submit a brief on the basis of the existing evidence.[431] However, as the Defence had no precise idea about how the Majority would formulate its conclusions under article 25(3)(d)(ii), the best that could be expected from the accused was for him to formulate general denials. This so called opportunity for the accused to defend himself on the basis of the existing record therefore amounted to little more than a chance to plead "not guilty" to whatever charges under 25(3)(d)(ii) the Majority had in mind. Accordingly, on 25 October 2013, the Defence was confined to reiterating its inability to provide an

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[426] See the "Dissenting opinion of Judge Cuno Tarfusser" to the Katanga Regulation 55 Appeals Decision, emphasising that the Notice Decision did not provide enough detail to allow Germain Katanga to prepare his defence vis-à-vis the recharacterisation, par. 24, 27

[427] ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga, Defence Observations on Article 25(3)(d), ICC-01/04-01/07-3369, par. 193

[428] Supra note 156, par. 127

[429] Supra note 366, par. 1578

[430] ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga, Decision on the Defence Requests set forth in observations 3379 and 3386 of 3 and 17 June 2013, ICC-01/04-01/07-3388-tENG, par. 17-18

[431] The Majority Decision (ICC-01/04-01/07-3436) was couched as an 'invitation' but it was clear from the wording of paragraph 18 Decision that this was the Defence's last chance: ICC, TC II, Situation en République Démocratique du Congo Affaire le Procureur v. Germain Katanga, Décision relative aux observations de la Défense (document 3397-Conf du 17 Septembre), ICC-01/04-01/07- 3406, par. 87

adequate response or defence in respect of the altered mode of liability in the absence of additional investigations.[432]

- Right not to be compelled to testify (article 67(1)(g))

It is noteworthy that Germain Katanga's testimony is by far the most relied upon source of evidence in the Majority Opinion. There is nothing untoward about using the testimony of an accused against him or her. However, it is telling that in this case Germain Katanga's testimony is the main source of incriminating evidence under the new article 25(3)(d)(ii) charges, i.e. the charges applied after re characterization. However, if the charges had remained as confirmed by the Pre-Trial Chamber (article 25(3)(a)), his evidence would have been almost entirely exculpatory. Germain Katanga was not aware of any charges under article 25(3)(d)(ii) and that it is thus unlikely that he would have adjusted his testimony to escape conviction on this basis.[433]

The terms of this Decision indicated unambiguously that Germain Katanga waived his right to remain silent only in relation to the confirmed charges under article 25(3)(a) and that questions that went beyond the scope of these charges were strictly prohibited. It is reasonable to assume that the accused and his Defence team also misapprehended the situation and did not contemplate the possibility that Germain Katanga's testimony could ever be used to convict him under article 25(3)(d)(ii). Accordingly, Germain Katanga did not knowingly and freely waive his right to remain silent in relation to article 25(3)(d)(ii). It seems a fairly basic and uncontroversial requirement that when an accused waives his right to remain silent, he must do so with full understanding of what this waiver implies. If the accused reasonably misapprehends the consequences of his waiver of the right to remain silent, the evidence thus obtained cannot be used against him. To the extent that the accused was – unintentionally - misled in this regard by the Chamber's decisions and utterances, any answers Germain Katanga gave that incriminated him under article 25(3)(d)(ii) were given in violation of his free will. Using this evidence against him therefore violates article 67(1)(g).[434]

- Application of standard of proof beyond reasonable doubt

The Majority failed to comply with its own precept that indirect evidence can only serve as proof beyond reasonable doubt if the incriminating inference is the only reasonably possible one. To indicate one example, in paragraph 1277 of the Majority Opinion, the Majority infers from a letter by Cobra Matata that the "family" of Germain Katanga were the direct consignees of the ammunition coming from Beni.

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[432] ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga, Defence Observations on Article 25(3)(d) of the Rome Statute", ICC-01/04-01/07- 3417, para. 1

[433] Supra note 156, par. 167, 168

[434] Supra note 156, par. 52, 54, 59

Apart from the fact the Majority does not explain who the "family" of Germain Katanga is in this context, it also entirely overlooks the possibility that Cobra Matata may have misunderstood the situation (as might reasonably be inferred from Oudo's response) or indeed second that the reason why Cobra Matata did not receive ammunition as he wanted was because those in charge in Beni did not want him to ("Plainte de Cobra Matata", EVD-D02-00243).[435]

Another issue that is directly related to the correct application of the standard of proof is that of missing evidence. There were quite a number of potential witnesses who could in all likelihood have given the Court highly relevant information, as they ostensibly played key roles in this sad story. Of course, there is nothing to guarantee that these persons would all have been willing to testify or, even if they were, that they would have told the complete truth. However, the complete absence of evidence from those who were really at the center of things at the time inevitably creates the impression that essential information is missing from the record.[436]

There was a tendency throughout the Majority Opinion to brush over serious credibility problems of many of the witnesses.[437] Too often, witnesses admitted to glaring inconsistencies between what they said on the stand and what they had declared in previous statements.[438] Indeed, the Majority acknowledged the numerous incongruities in P-132's testimony[439] however concluded that it could rely on certain parts of this witness's testimony.[440] The same is true with respect to witness P-161, who had previously stated that he had heard a recording of a radio-intercept (implying that he was not present) but said at trial that he was present and even intervened personally.[441] Of course, it is not the case that if there are reasonable doubts about part of a witness' testimony, this automatically disqualifies the rest of it. However, considerable caution should be exercised in this regard. Accordingly, it becomes unsafe for any further reliance to be placed on the testimony, except when there are very strong indications about the truthfulness and reliability of those parts of the testimony that are not affected by the insincerity at all.[442]

Based on these considerations, the evidence of two witnesses was of specific attention: P-28[443] and P-12. For example, in one instance, the Majority relies on

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[435] Supra note 156, par. 147

[436] Supra note 156, par. 148; See Supra note 366, par. 62-63

[437]To indicate one example, the Majority accepts that P-132's testimony is in considerable part contradicted by that of P-353. It is thus not possible that both their stories can be true at the same time. Yet, the Majority Opinion states in paragraph 211 that "there can be no question of affording precedence to one testimony over another as regards the circumstances of P- 132's abduction […]"

[438] For example, P-132's testimony changed almost entirely between her different statements and her testimony at trial

[439] Supra note 366, par. 203

[440] Supra note 366, par. 212

[441] Supra note 366, par. 222

[442] Supra note 156, par. 153

[443] Supra note 366, par.119-147

hearsay evidence given by witnesses P-28 and D02-160 to establish the identity of the assailants of Nyankunde.[444] According to Minority Opinion[445], it is quite uncontroversial that one cannot speak of meaningful corroboration when the source of information for both P-28 and D02-160's statements with respect to the attack on Nyankunde are unknown. Another instance was when the Majority once again relied on hearsay evidence given by P-28 to corroborate the testimony of witness D02-148.[446]As far as P-12 is concerned, his evidence was consisted mainly of speculation or opinion evidence, much of it based on anonymous hearsay. The Majority acknowledged the issue,[447] but despite concluding that prudence is called for in relation to all his evidence that is not based on personal observation,[448] references to his testimony of this kind were strewn throughout the Majority's Opinion. In the Minority view, these references are intended merely to indicate corroboration, but it is difficult to see how opinion evidence based on hearsay could ever provide a meaningful level of corroboration.

It is important to note that no forensic evidence was available and that the Chamber's findings concerning the victims of the attack are entirely based on testimonial evidence.[449] The Majority was left with some anonymous hearsay evidence[450] including also among other pieces of evidence a report of UN investigators.[451]

The Majority placed excessive weight on a number of documents: "Lettre de savons", EVD-OTP-00025; "Lettre Évangélisation", EVD-OTP-00238; "Lettre Perception taxes d'or", EVD-OTP-00239; "Lettre Défense de brandir les armes", EVD-OTP-00278; "Rapport de service", EVD-D02-00231 (this document consists of a handwritten report by commander Oudo Mbafele, addressed to several authorities, including the RCD/ML, FRPI and CODECO, and explicitly mentions the "Neutralisation of the enemy forces of the UPC based in Bogoro, Chay, Makabho, Kombokhabo, Mandro … including the fall of Bunia); "Plainte de Cobra Matata", EVD-D02-00243[452] which it considers were proof of the allegation that there was a so-called "common authority" based in Aveba.[453] These documents provided the evidentiary basis for two sets of crucial findings by the Majority, the first being the

[444] Supra note 366, par.553
[445] Supra note 156, par. 155, 158, 164
[446] See Supra note 366, par.1003
[447] See Supra note 366,, par.189
[448] See Supra note 366, par. 197
[449] See Supra note 366, par. 809–855
[450] See, in particular, the vague and general testimony of several hearsay witnesses listed in the footnotes to paragraph 558 of the Supra note 366
[451] See SC Res. 573 of 16 July 2004, Special report on the events in Ituri, January 2002-December 2003, available at http://reliefweb.int/sites/reliefweb.int/files/resources/93F81A37C5B409E785256EEC00679CE1-unsc-drc-16jul.pdf, EVD-OTP-00206
[452] Supra note 156, par. 200
[453] See Supra note 366, par. 678

organisation of the camps in the Walendu-Bindi area,[454] and the second being the role of Germain Katanga as the president of the movement of the combatants of Walendu –Bindi.[455] Also, the so-called "Grievances Letter" ("Lettre de doléances") is a crucial piece of evidence in the Majority's reasoning leading to the conclusion that the Ngiti fighters of Walendu -Bindi were moved by ethnic hatred towards the Hema.[456]

It is crucial to note, in this regard, that none of the authors of any of the documents in question testified. Given the opaque nature of the content of some of the documents, and the difficulty to understand who was addressed by the many unidentified individuals who are mentioned as addressees or as copied for information, it was impossible, to fully understand the content and significance of these documents. Indeed, in Minority' s view many of the inferences drawn by the Majority from these documents could easily be discredited by the testimony of the authors of the letters. The probative value of these documents was limited and did not permit making any findings beyond reasonable doubt. The Majority nevertheless claimed to see some coherence, but could only do so by making a number of assumptions about the several positions mentioned in the documents. For example, in paragraph 677, the Majority stated that Germain Katanga was mentioned in four different documents. However, the Minority argued that in relation to "Lettre Défense de brandir les armes", EVD-OTP-00278 and "Lettre Perception taxes d'or", EVD-OTP-00239, Germain Katanga's name did not appear and the accused has never recognised that he saw these documents or that he was indeed the addressee. Although reference was made to Germain Katanga's family in "Plainte de Cobra Matata", EVD-D02-00243, this is in the body of the text and contains no information about any alleged affiliation.[457]

The village of Bogoro was attacked on 24 February 2003 and innocent people died and suffered as a result of this attack. The crucial factual allegation in this case was if this attack was directed against the civilian population of Bogoro (Majority Opinion), if the civilian population was just an incidental loss, without making any distinction between UPC combatants and civilians (Minority Opinion) or if, according to my point of view the attack was directed against the Hema civilian population as such, constituting a crime of genocide (art. 6(a) ICC St.) instead of crime against humanity (7(1)(a) ICC St.). The Prosecutor's case is that the objective of the attackers of Bogoro was to "wipe out" the village and its Hema population.[458]

[454] See Supra note 366, par. 676-678
[455] See Supra note 366, par.1312-1331
[456] Supra note 156, par. 234
[457] Supra note 156, par. 2014, 204
[458]ICC, PTC I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, ICC- 01/04-01/07-436-Anx1, par. 63 and 93; ICC, PTC I, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Mémoire final, ICC-01/04-01/07-3251-Corr-Red, par. 38; Supra note 30, par. 33

The Majority argued that the Hema civilian population was targeted as such -dolus directus 1st degree- (Majority Opinion: 1155, 1665). The Majority's crucial allegation was that members of the Ngiti fighters of Walendu-Bindi were filled with a desire for revenge towards the Hema population and motivated by a so-called "anti-Hema ideology" (Majority Opinion: par. 717, 1143-45).

According to the Majority, the evidence showed that, on 24 February 2003, a group of Ngiti fighters of Walendu-Bindi, together with other groups, attacked Bogoro and committed crimes against the Hema civilian population on a massive scale and in a systematic manner (Majority Opinion: par. 755, 1159). The Majority believed that the Ngiti fighters of Walendu-Bindi constituted a "group acting with a common purpose" (Majority Opinion: par. 1650 – 1666) in the sense of article 25(3)(d) of the Statute and that their main purpose behind the attack on Bogoro was to "wipe out " the Hema civilian population there based on an anti Hema ideology (Majority Opinion: par. 1139-1154). It argued that the political objective of EMOI to reclaim Ituri was perfectly compatible with the desire to exterminate the entire Hema population of Bogoro on the part of the Ngiti fighters of Walendu-Bindi (Majority Opinion: par. 600, 1147-1148). The piece of evidence "Lettre de doléances", EVD-D03-00098 a document, which dates from 15 November 2002 and is signed by 18 representatives of the "Communauté Lendu de Base", contains an appeal for assistance by the Lendu community and lists a number of alleged attacks carried out by the UPC and its allies against Lendu villages) is a crucial piece of evidence in the Majority's reasoning leading to the conclusion that the Ngiti fighters of Walendu -Bindi were moved by ethnic hatred towards the Hema (Majority Opinion contains almost 40 references to this document).

According to these allegations of the Majority one can reasonably doubt on the characterization of facts as crime against humanity according to art. 7(1)(a) ICC St. instead of crime of genocide art. 6(a) ICC St. As the Majority based on the evidence found that there was adequate evidence to establish that the attack was against the Hema population "as such", based on an anti Hema ideology, for reasons of "hatred", "vengeance", "revenge", with intention to "wipe out" or raze Bogoro and with the intention to exterminate the entire Hema population of Bogoro do not all these elements constitute a different interpretation of the existent evidence and consequently of the facts?

1.2 The Prosecutor v. Jean-Pierre Bemba Gombo

On 15 June 2009, PTC II delivered its CD pursuant to art. 61(7)(a) and (b) ICC St. on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, in which it found that there was "sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba knew that MLC troops were committing or were about to commit [...] crimes from on or about 26 October 2002 to 15 March 2003." On this basis, PTC II confirmed the charges against Mr Bemba pursuant to art. 28(a) ICC St., for the crimes of murder as a crime against humanity and as a war crime, rape as a crime

against humanity and as a war crime and pillaging as a war crime, within the meaning of art. 7(l)(a), 7(l)(g), 8(2)(c)(i), 8(2)(e)(vi) and 8(2)(e)(v) ICC St. The PTC did not consider the "should have known" standard set out as an alternative in art. 28(a)(i) ICC St.[459]

The Chamber noted that under reg. 55 ICC Reg., it may change, in its decision under art. 74 ICC St., the legal characterization of the facts to accord with the form of participation of the accused under Article 28, without exceeding the facts and circumstances described in the charges and any amendment to the charges.[460]

Although in accordance with reg. 55(1) ICC Reg., any change in the legal characterization of the facts is ultimately made in the Chamber's decision under art. 74 ICC St., pursuant to reg. 55(2) ICC Reg. if it appears to the Chamber, at any time during the trial, that the legal characterization of the facts may be subject to change, the Chamber must give notice to the parties and participants of this possibility.[461]

The Chamber gave notice to the parties and participants that, pursuant to reg. 55(2) ICC Reg., after having heard all the evidence the Chamber may modify the legal characterization of the facts so as to consider in the same mode of responsibility the alternate form of knowledge contained in art. 28(a)(i) ICC St., namely that owing to the circumstances at the time, the accused "should have known" that the forces under his effective command and control or under his effective authority and control, as the case may be, were committing or about to commit the crimes included in the charges confirmed in the CD.[462]

Given the Prosecution's submission that the possible change envisaged by the Chamber would have no impact on the prosecution case and that no additional evidence would be presented to prove it, [463] the Defense's allegation that it "cannot be expected to guess what such a case might have consisted of and what evidence would have been advanced in support of it"[464] is not tenable. To the contrary, the facts and

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[459] Supra note 18,

[460] ICC, TC III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2324, par. 3

[461] Supra note 460, par. 4

[462] Supra note 460, par. 5

[463] ICC, TC III, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, Decision requesting the defence to provide further information on the procedural impact of the Chamber's notification pursuant to Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2419, par. 7, referring to ICC, TC III, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, Prosecution's Submissions on the Procedural Impact of Trial Chamber's Notification pursuant to Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2334, par. 13

[464] ICC, TC III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Defence further submissions on the notification under Regulation 55(2) of the Regulations of the Court and Motion for notice of material facts and circumstances underlying the proposed amended charge, ICC-01/05-01/08-2451-Red, par. 13

circumstances, as well as the evidence submitted in order to prove them, are exactly the same. There is therefore no new "case to answer" as alleged by the Defense.[465]

Pursuant to reg. 55(2) and (3)(a) ICC Reg., when the possibility of a change to the legal characterization of the facts is envisaged at any time during the trial, the TC "may suspend the hearing and ensure that the participants [and particularly the accused] have adequate time and facilities for effective preparation".[466]

The Chamber has considered the need to strike a balance between its obligation to ensure that the trial is fair and expeditious and that the accused is tried without undue delay and its duty to ensure the right of the accused to have adequate time and facilities for the preparation of his defense. Taking into account that, as previously stressed, the Prosecution will not submit any additional evidence in support of the potential change to the legal characterization of the facts and circumstances relevant to the form of knowledge contained in art. 28(a)(i) ICC St., the Chamber is of the view that a temporary suspension of the proceedings would serve the purpose of providing the accused with adequate time for the effective preparation of his defense.[467] The Chamber was mindful that, pursuant to reg. 55(3)(b) ICC Reg. and if determined necessary by the Chamber, the accused shall be given the opportunity to question witnesses who have already testified before the Court.[468]

Pursuant to reg. 55(3)(b) ICC Reg., if determined necessary by the Chamber, the accused shall be given the opportunity "to call a new witness or to present other evidence admissible under the Statute in accordance with art. 67(1)(e) ICC St."[469]

In view of the foregoing, and subject to any further decision on the matter, the Chamber hereby: (i) temporarily suspends the proceedings and decides that the presentation of evidence by the Defense (iii) instructs the prosecution to provide its observations in response, (iv) orders the Defense to disclose and/or permit the prosecution to inspect any additional r. 78 ICC RPE material as soon as it decides to use an item. [470]

The Chamber has stated that the material facts underlying the potential alternate form of responsibility envisaged in the reg. 55 ICC Reg. notice do not differ from those underlying the allegation that the accused "knew" of the alleged commission of the relevant crimes. In this regard, the Chamber identified the precise paragraphs of the CD and the DCC which set out the facts underlying the allegation that the accused knew about the crimes allegedly committed by the forces allegedly under his

[465] ICC, TC III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines, ICC-01/05-01/08-2480, par. 12
[466] Supra note 465, par. 13
[467] Supra note 465, par. 15
[468] Supra note 465, par. 16
[469] Supra note 465, par. 18
[470] Supra note 465, par. 22

control.[471]In line with the proposed re-characterization, it is these facts which may be considered by the Chamber in relation to its determination as to whether the accused, "owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes". Furthermore, in its submissions on the reg. 55 ICC Reg. notice the Prosecution indicated that its case would not change.[472] Thus, the Defense’s contention that "the course envisioned by the Chamber goes well beyond [a legal re-characterization of the facts] by adding a new set of facts and factual allegations to the charges" is incorrect and, therefore, the question of the Chamber "adding a new set of facts and factual allegations to the charges" does not arise from the Impugned Decision.[473]

Sub-issue 1 relates to the question of whether the application of reg. 55 ICC Reg. by the Chamber is consistent with the accused's right to have prompt and detailed notice of the charges. [474]The Chamber has clearly stated that the underlying facts will remain unchanged regardless of whether the Chamber considers the knowledge of the accused against the standard of "knew" or of "should have known".[475] Reg. 55(2) ICC Reg. states that, "[i]f, at any time during the trial, it appears to the Chamber that the legal characterization of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility". However, this freedom is subject to certain conditions designed to limit any potential prejudice to the accused. If a Chamber does decide to give such notice under reg. 55 ICC Reg., pursuant to sub-regulations 55(2) and (3) ICC Reg. it must, (i) "[after having heard the evidence] give the participants the opportunity to make oral or written submissions", (ii) ensure that the accused has "adequate time and facilities for the effective preparation of his or her defence in accordance with art. 67(1) (b) ICC St.", and (iii) "[i]f necessary, [give the accused] the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence".[476] For the above reasons, the Chamber considers that the First Issue and Subissue 1 do not amount to "appealable" issues under Article 82(l)(d) of the Statute.[477]

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[471] Supra note 465, par. 11

[472] ICC, TC III, Situation in the Central African Republic in the case of the Prosecutor v. Jean Pierre Bemba Gombo, Prosecution’s Submissions on the Procedural Impact of Trial Chamber’s Notification pursuant to Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2334, par. 13

[473] ICC, TC III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Public Redacted Version of "Decision on 'Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines'" of 11 January 2013, ICC-01/05-01/08-2487-Red, par. 19; Supra note 465

[474] ICC, TC III, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and Related Procedural Deadlines, ICC-01/05-01/08-2483-Red, par. 20(ii)(a)

[475] Supra note 473, par. 20

[476] Supra note 473, par. 22

[477] Supra note 473, par. 24

The Chamber was of the view that Subissues 3, 4 and 6[478] (alleged violations of the accused's right to liberty, his right to be presumed innocent and to have the prosecution bear at all times the burden of proof, and his right to be tried by a tribunal which does not lack the appearance of impartiality) are issues of a general nature relating to the legality of reg. 55 ICC Reg. per se and entail legal issues that would arise in any case where a Chamber of this Court decided to apply this provision.[479] Sub-issue 6 also includes a specific issue in that the Defense asserted that the Chamber failed "to consider and give weight to the rights of Mr Bemba before [applying reg. 55 ICC Reg.]". In this regard, the AC has already determined that reg. 55 ICC Reg. is not inherently incompatible with the ICC St., general principles of international law, or the accused's right to a fair trial. The Chamber noted in particular, with regard to the Defense's general assertions that reg. 55 ICC Reg. violates the rights of the accused to a fair trial - including, inter alia, his right to be presumed innocent and to be tried by a tribunal which does not lack the appearance of impartiality - that the AC has, after reviewing international human rights jurisprudence, determined that the application of reg. 55 ICC Reg. during a trial does not per se breach the rights of an accused to a fair trial.[480] For the above reasons, the Chamber is of the view that Sub-issues 3, 4 and 6 do not constitute specific appealable issues arising from the Impugned Decision.[481]

Under Sub-issue 2, the Defense submitted that "the course taken by the Chamber resulted in the violation of [the accused's] right to have adequate time and resources to prepare". Under Sub-issue 5, the Defense claimed that "the course taken by the Chamber resulted in the violation of [the accused's] right to be tried without undue delay".[482] None of the issues raised in the Request constituted appealable issues under art. 82(1)(d) ICC St.[483]

For the foregoing reasons, the Chamber denied the Request of Defense for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines and consequently the relevant timeframes as set out in that Decision[484] remained in effect.[485]

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[478] Supra note 474, par. 20(ii)(c), 20(ii)(d) and 20(ii)(f).
[479] Supra note 473, par. 25, 29
[480] Supra note 317, par. 78, 81-87
[481] Supra note 437, par. 30
[482] Supra note 474, par20(ii)(b), 20(ii)(e)
[483] Supra note 473, par. 35
[484] Supra note 465
[485] Supra note 473, par. 36

2. **A qualification of conduct as a different sub-category of crime/a qualification as a different category of crime, including a possible ‘‘increase in qualification’’**

2.1 The Prosecutor v. Thomas Lubanga Dyilo

The PTC I on its CD accepted that there was sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003. It also confirmed that there was sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and usin them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003.[486]

On 22 May 2009, the legal representatives of the victims filed a joint request pursuant to Regulation 55 of the Regulations of the Court, requesting the Chamber to consider a legal re-characterisation of the facts as, respectively, sexual slavery pursuant to Articles 7(l)(g) or 8(2)(b)(xxii) or 8(2)(e)(vi) of the Rome Statute ("Statute"), and inhuman and / or cruel treatment pursuant to Articles 8(2)(a)(ii) or 8(2)(c)(i) of the Statute. In addition, the legal representatives requested that the Chamber accept oral or written observations on any issue related to this aforementioned legal recharacterisation.[487]

The TC I noted that "[t]he submissions of the legal representatives of the victims and the evidence heard so far during the course of the trial persuade the majority of the Chamber that such a possibility [that the legal characterization of facts may be subject to change] exists". The TC stated furthermore that it would, at an appropriate stage of the proceedings, give the parties and participants an opportunity to make submissions, in accordance with reg. 55 (2) ICC Reg., and that the purpose of the Decision was "to give notice to the parties and participants that it appears to the majority of the Chamber that the legal characterization of facts may be subject to change."[488]

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[486] Supra note 105

[487] ICC, TC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Demande conjointe des représentants légaux des victimes aux fins de mise en oeuvre de la procédure en vertu de la norme 55 du Règlement de la Cour, ICC-01/04-01/06-1891.

[488] ICC, TC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v.Thomas Lubanga Dyilo, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049, par. 33,34,35

In the Clarification, the TC "underlined that the parties and participants shall be guided by the understanding that the specific new facts and circumstances that the Chamber may consider are those listed in the Joint Application of the legal representatives". Furthermore, the TC stated that: reg. 55(2) ICC Reg. allows for the incorporation of additional facts and circumstances provided that notice to the participants is granted and an opportunity to make oral or written submissions concerning the proposed changes is afforded. Those "additional facts" must in any event have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges. [489]

In his Minority Opinion, Judge Fulford emphasized that in his view, reg. 55 ICC Reg. "created an indivisible or singular process". Recalling reg. 52 ICC Reg. of the Court, he explained that he was of the opinion that charges are, "in essence, a combination of a 'statement of facts' and the 'legal characterization' of those facts". He stated furthermore that reg. 55 ICC Reg. is restricted by both arts. 74(2) and 61(9) ICC St. In his opinion, the former limits the power to modify the legal characterization of facts to the "facts and circumstances" described in the charges or any amendment thereto, while the latter limits the TC's powers to amend charges. In Judge Fulford's view, "once the trial has begun, the charges cannot be amended, nor can additions or substitution to the charges be introduced", and "a modification to the legal characterization of the facts under reg. 55 ICC Reg. must not constitute an amendment to the charges, an additional charge, a substitute charge or a withdrawal of a charge, because these are each governed by art. 61(9) ICC St.". [490]

Turning to the distinction between an amendment of the charges and a modification of the legal characterization of facts Judge Fulford questioned whether any modification of the legal characterization would not automatically lead to an "amendment of the charges. Without exploring this question further, he stated that "unless in due course reg. 55 ICC Reg. is found to be incompatible with art. 61(9) ICC St., [the determination of whether a modification of the legal characterization amounts to an amendment] will (at the very least) constitute a question of fact and degree, to be assessed on a case-by-case basis". He stated that "in due course, the debate is likely to be focused on whether the TC is restricted by way of modifications under reg. 55 ICC Reg. to such relatively limited steps as, by way of example, applying a lesser

[489] ICC, TC I, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Clarification and further guidance to parties and participants in relation to the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2093, par. 8

[490] ICC, TC I, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Second Corrigendum to 'Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"", ICC-01/04-01/06-2069-Anxl, par. 4, 8-11, 15-17

'included offence' [...] to that contained in the DCC and reclassifying the mode of liability". [491]

Furthermore, Judge Fulford explained that, the first sub-regulation of the provision cannot be severed from the second and third sub-regulations because this would mean that the TC, in its decision under art. 74 ICC St. at the end of the trial, could modify the legal characterization of the facts without any of the safeguards for the rights of the accused which are provided in the second and third sub-regulations of reg. 55 ICC Reg. [492] Judge Fulford stated furthermore that, the victims were not seeking a modification of the legal characterization of the facts, but were rather proposing to add five additional charges. [493]

Mr Lubanga Dyilo's principal submission was that reg. 55 ICC Reg. is "inherently incompatible" with ICC St. and ICC RPE. He submitted that in adopting reg. 55 ICC Reg., the plenary of the judges went beyond its powers under art. 52(1) ICC St. to adopt Regulations of the Court necessary for its "routine functioning". He argued that the provision is in conflict with arts. 61(4) and 61(9) ICC St., read with rr. 121(4) and 128 ICC RPE, which regulate the modification of the charges. He argued that there is no general principle of international law that would give a TC at the Court the right to modify the legal characterization of the facts.[494]

In the alternative, Mr Lubanga Dyilo submitted that reg. 55 ICC Reg. establishes a single re-characterization process, which is subject to all of the conditions and guarantees provided for cumulatively in its three sub-regulations. Therefore, even if the TC decides to modify the legal characterization of the facts and circumstances described in the charges at the stage of its decision under art. 74 ICC St., it must implement the rights and guarantees set out in sub-regulations (2) and (3) of Reg. 55 ICC Reg., as this is the only interpretation that respects the accused's fundamental rights. Mr Lubanga Dyilo contended that as the legal characterization of the facts constitutes an essential component of the charges, he must be informed promptly and in detail of any modification, in order to allow him to challenge effectively the validity of those charges against him, because the knowledge of the legal characterization is crucial to the assessment of the relevance of facts.[495]

Expressing his agreement with Judge Fulford's Minority Opinion, Mr Lubanga Dyilo submitted that reg. 55 (2) and (3) ICC Reg. allows the TC to modify the legal characterization only based on the facts and circumstances specifically described in

[491] Supra note 490, par. 18-20
[492] Supra note 490, par. 26-27
[493] Supra note 490, par. 34
[494] ICC, AC, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Defence Appeal against the Decision of 14 July 2009 entitled Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Cour f \ ICC-01/04-01/06-2112-tENG, par. 5,6,37
[495] Supra note 494, par. 8-15

the charges and any potential amendment thereto prior to the commencement of the trial. In his view, the sole purpose of reg. 55 ICC Reg. is to rectify an error of legal characterization by replacing one characterization with another. Mr Lubanga Dyilo argued that no additional offences or more serious charges can be added under reg. 55 ICC Reg. after the start of trial because this would conflict with art. 61(9) ICC St. and r. 128 ICC RPE. Referring to the judgment of the TC of ICTY in the case of Prosecutor v. Kupreskic et al.[496] he submitted that "any re-characterization of the charges at the close of the trial may only be in favor of a less serious offence included in the initial charging document'. He submitted that pursuant to art. 61(9) ICC St., the charges must be definitively defined prior to the commencement of the trial. He contended that reg. 55 ICC Reg. does not give authority to the TC to consider and rely on matters of which it has not been legally seized. Furthermore, he argued that art. 74(2) ICC St. does not allow the TC to take into consideration, in their final decision, "facts other than those set out in the charges as confirmed by the PTC". He then contended that art. 67(1)(a) ICC St. enshrines the fairness principle and the confinement of "the facts of which TC I is legally seized [...] to those set out in the CD". Mr Lubanga Dyilo argued finally that a legal re-characterization based on a modification of the factual basis of the charges would not allow him to adjust his defense and would thus violate art. 67(1)(a) and (b) ICC St. [497]

In the view of the Prosecutor, the language of reg. 55 ICC Reg. read as a whole clearly establishes that the facts must remain fixed and only their legal characterization can be subject to change. Referring to the travaux préparatoires of ICC St., the Prosecutor contended that any decision of the TC rendered under art. 74 ICC St. that would exceed the facts and circumstances described in the charges and any amendments thereto would violate art. 74(2) ICC St. The Prosecutor added that the interpretation of reg. 55 ICC Reg. cannot contradict the statutory framework or the ICC RPE. The Prosecutor also took issue with the TC's reading of the case law of the ECHR and emphasized that in the cases referred to by the TC, the factual scope of the charges had always remained intact.The Prosecutor further argued that by dividing reg. 55 ICC Reg. into two different procedures, the TC circumvented the safeguards established by the provision and he submits that "it would be unfair to the Prosecution and to the accused if they were denied any right to make submissions, to call new evidence, or to re-examine previous witnesses in order to fully explore the new issues and to address the new legal elements". As to amending the charges under art. 61(9) ICC St., the Prosecutor asserted that he was vested with exclusive powers to amend the charges, but acknowledged that after the confirmation of the charges and before the commencement of the trial such powers are limited. Thereafter, he can only withdraw the charges or initiate subsequent prosecutions. With regard to the relationship between art. 61(9) of ICC St. and reg. 55 ICC Reg., the Prosecutor refuted Mr Lubanga Dyilo's argument that a change in the legal characterization

[496] Supra note 112, par. 31
[497] Supra note 494, par. 16, 18-35

necessarily constitutes an amendment to the charges. Furthermore, the Prosecutor averted that reg. 55 ICC Reg. is not limited to permitting re characterization of a charge to a 'lesser included offence' because the only requirement that reg. 55ICC Reg. sets out is the consistency with the facts and circumstances described in the charges and any amendments thereto.[498]

Mr Lubanga Dyilo submitted that reg. 55 ICC Reg. is illegal because it affects directly the substance of the trial and the rights of the accused and therefore goes beyond the "routine functioning" of the Court. [499] In essence, Mr Lubanga Dyilo submitted that the judges acted ultra vires when adopting reg. 55 ICC Reg.[500] The AC noted that the term "routine functioning" is not defined any further in ICC St. or ICC RPE. However, the term has been described as a "broad concept" and it has been observed that "routine functioning" also concerns matters of "practice and procedure". [501]The AC noted furthermore that ICC Reg. contain several important provisions that affect the rights of the accused person, inter alia, on detention and on the scope of legal assistance paid by the Court.[502] Thus, while the AC acknowledged that the question of modification of the legal characterization of facts is an important question that directly impacts on the trial, it is not persuaded that for that reason alone, it cannot be part of the routine functioning of the Court.[503] In sum, the Appeals Chamber was not persuaded that the adoption of reg. 55 ICC Reg. was in breach of art. 52(1) ICC St.[504]

Mr Lubanga Dyilo also averted that reg. 55 ICC Reg. is inherently incompatible with art. 61(9) ICC St. and is therefore illegal. In Mr Lubanga Dyilo's submission, any modification of the legal characterization of facts amounts to an amendment of the

[498] ICC, AC, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Prosecution's Document in Support of Appeal agamst the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' and urgent request for suspensive effect, ICC-01/04-01/06-2120, par. 28-49; ICC, AC, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Prosecution's Response to the Defence Appeal against the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' and request for suspensive effect", ICC-01/04-01/06- 2136, par. 10-13

[499] Request for Extension of the Page Limit, Annex I, ICC-Ol/04-01/06-2113-Anxl-tENG, paras 37

[500] Supra note 317, par. 67

[501] Behrens H.-J., Staker C., “Article 52 - Regulations of the Court”, in Commentary on the Rome Statute of the International Criminal Court, Triffterer Ot./ Ambos K. eds., 2nd edition, Beck, 2008, at margin number 11,13

[502] See also C. Kreß, 'The Procedural Texts of the Intemational Criminal Court, Journal of International Criminal Justice, 2007, p. 537-543, at p. 540

[503] Supra note 317, par. 69

[504] Supra note 317, par. 72

charges and therefore must conform to the procedure set out in art. 61(9) ICC St. and rr 121(4) and 128 ICC RPE. [505]

The AC noted that if one adopted Mr Lubanga Dyilo's interpretation of art. 61(9) ICC St., the only change to the charges after the commencement of the trial that would still be possible would be the withdrawal of a charge by the Prosecutor with the permission of the TC (third sentence of art. 61(9) ICC St.). The TC could not re-visit the legal characterization that was confirmed by the PTC at the end of the confirmation procedure; the TC could enter a conviction only on the basis of the legal characterization expressly confirmed. Regulation 55 ICC Reg. would be inherently incompatible with art. 61(9) ICC St. and therefore could never be applied.[506]

The AC was not persuaded by the interpretation of art. 61(9) ICC St. put forward by Mr Lubanga Dyilo. First, the AC recalled that art. 61(9) ICC St. addresses primarily the powers of the Prosecutor to seek an amendment, addition or substitution of the charges, at his or her own initiative and prior to the commencement of the trial; the terms of the provision do not exclude the possibility that a TC modifies the legal characterization of the facts on its own motion once the trial has commenced. Regulation 55 ICC Reg. fits within the procedural framework because at the confirmation hearing, the Prosecutor needs only to "support each charge with sufficient evidence to establish substantial grounds to believe", (art. 61 (5) ICC St.) whereas during trial, the onus is on the Prosecutor to prove "guilt beyond reasonable doubt" (art. 66(2) and (3) ICC St.). Thus, in the AC's view, art. 61(9) ICC St. and reg. 55 ICC Reg. address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible. Second, the AC noted that Mr Lubanga Dyilo's interpretation of art. 61(9) ICC St. bears the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that tum out to be incorrect, in particular based on the evidence presented at the trial. This would be contrary to the aim of the ICC St. to "put an end to impunity" (fifth paragraph of the Preamble). The AC is of the view that a principal purpose of reg. 55 ICC Reg. is to close accountability gaps, a purpose that is fully consistent with ICC St. Third, contrary to Mr Lubanga Dyilo's claim, applicable human rights standards do not prohibit the modification of the legal characterization in the course of a trial, as long as the rights of the accused person are safeguarded. This question will be addressed in more detail below.[507] The AC found that reg. 55 ICC Reg. is not inherently incompatible with art. 61(9) ICC St. Whether the TC's interpretation of reg. 55 ICC Reg. is compatible with art. 61(9) ICC St. will be discussed below. [508]

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[505] ICC, AC, Situation in the Democratic Republic of the Congo the Prosecutor v. Thomas Lubanga Dyilo, Request for Extension of the Page Limit, Annex I, ICC-Ol/04-01/06-2113-Anxl-tENG, par. 35-38.

[506] Supra note 317, par. 72

[507] Supra note 317, par. 77

[508] Supra note 317, par. 78

General principles of international law in Lubanga case

Mr Lubanga Dyilo submitted that reg. 55 ICC Reg. does not find support in any general principle of international law and that it is incompatible with the principles established in the case law of the ICTY. In his submission, the Kupreskic Trial Judgment indicates that a change in the legal characterization of facts to a different or more serious crime requires an amendment to the charges at the initiative of the Prosecution, in order to put the Defense on notice, and this principle should apply, mutatis mutandis, at the Court as well.[509]

In the view of the AC, Mr Lubanga Dyilo's arguments were misconceived. First, the AC noted that on the face of the Court's legal texts, there is no general requirement that the provisions of ICC Reg. must be limited to the codification of general principles of international law. The AC noted that Mr Lubanga Dyilo then focused on the Kupreskic Trial Judgment. As a starting point, the AC did not consider that ICC Reg. must necessarily reflect the approach adopted by the ICTY. In addition, it is noteworthy that the legal instruments of the ICTY do not contain a provision similar to Reg. 55 ICC Reg. At this Court, the situation is different. The judges of the Court adopted reg. 55 ICC Reg. as part of ICC Reg. Thus, there is no need to rely on general principles of law to determine whether or not legal re-characterization is permissible.[510] The AC was therefore not persuaded by Mr Lubanga Dyilo's argument that reg. 55 ICC Reg. should not be applied because of a purported inconsistency with general principles of international law.[511]

The AC noted that pursuant to art. 67(1) (a) ICC St., an accused person has the right to "be informed promptly and in detail of the nature, cause and content of the charge". In addition, pursuant to art. 67(1)(b) ICC St., the accused person has the right to "have adequate time and facilities for the preparation of the defense". Finally, under art. 67(1)(c) ICC St., the accused person has the right to "be tried without undue delay". These rights of the accused person reflect internationally recognized human rights.[512]

In the view of the AC, art. 67(1)(a) ICC St. does not preclude the possibility that there may be a change in the legal characterization of facts in the course of the trial, and without a formal amendment to the charges. This is supported by the jurisprudence of the ECtHR,[513]on art. 6(3)(a) of the Convention for the Protection of Human Rights

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[509] Supra note 317, par. 79
[510] Supra note 317, par. 80
[511] Supra note 317, par. 81
[512] Supra note 317, par. 83; See art. 14(3)(a) ICCPR, signed 16 December 1966, entered into force 23 March 1976, 999 UN Treaty Series 14668; art. 7(1) ACHPR, signed 27 June 1981, entered into force 21 October 1986, 1520 UN Treaty Series 26363; art. 8(2)(b) of the ACHR 'Pact of San Jose, Costa Rica', signed on 22 November 1969, entered into force on 18 July 1978, 1144 UN Treaty Series 17955; art. 6(3)(a) European Convention on Human Rights, signed 4 November 1950, as amended by Protocol 11, entered into force 3 September 1953, 213 UN Treaty Series 2889
[513] See ECHR, Pélissier and Sassi v. France, Judgment of 25 March1999, Application no. 25444/94; Dallos v. Hungary, Judgment of 1 March 2001, Application no. 29082/95; Sadak et al. v. Turkey (No.

and Fundamental Freedoms and of the Inter- American Court of Human Rights[514] on article 8 (2) (b) of the American Convention on Human Rights.[515]

Nevertheless, human rights law demands that the modification of the legal characterization of facts in the course of the trial must not render that trial unfair.[516] The AC noted in this context that art. 67(1)(b) ICC St. provides for the right of the accused person to "have adequate time and facilities for the preparation of the defence". It is to avoid violations of this right that reg. 55 (2) and (3) ICC Reg. set out several stringent safeguards for the protection of the rights of the accused.[517]

As to the right to a trial without undue delay (art. 67(1) (c) ICC St.), the AC does not consider that a change of the legal characterization of the facts pursuant to reg. 55 ICC Reg. as such will automatically lead to undue delay of the trial. Whether a re-characterization leads to undue delay will depend on the specific circumstances of the case.[518] In sum, therefore, the Appeals Chamber does not consider that reg. 55 ICC Reg. is inherently in breach of Mr Lubanga Dyilo's right to a fair trial.[519]

The TC's interpretation of reg. 55 ICC Reg.

Based on the consideration that reg. 55 ICC Reg. contains two distinct procedures that are applicable at different stages of the procedure, the TC was of the view that the provision would allow it to change the legal characterization "based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial." For the reasons stated below, the AC found that this interpretation of the provision was erroneous because reg. 55 (2) and (3) ICC Reg. may not be used to exceed the facts and circumstances described in the charges or any amendment thereto.[520]

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1), Judgment of 17 July 2001, Application nos. 29900/96, 29901/96, 29902/96 and 29903/96; /. H. and others v. Austria, Judgment, 20 April 2006, Application no. 42780/98; Miraux v. France, Judgment of 26 September 2006, Application no. 73529/01; Mattel v. France, Judgment of 19 December 2006, Application no. 34043/02; Abramyan v. Russia, Judgment of 9 October 2008, Application no. 10709/02

[514] IACHR, Fermin Ramirez v. Guatemala, Judgment of 20 June 2005

[515] Supra note 317, par. 84

[516] For instance, the ECHR found in Pélissier and Sassi v. France that a breach of art. 6 ECHR occurred in circumstances where the accused were not properly informed that the legal characterisation of the facts against them could be modified from coperpetration to aiding and abetting bankruptcy, par. 55-63. See also Sadak et al. v. Turkey (No. 1), Judgment of 17 July 2001, Application nos. 29900/96, 29901/96, 29902/96 and 29903/96, par. 57; Miraux v. France, Judgment of 26 September 2006, Application no. 73529/01, par. 32; Mattel v. France, Judgment of 19 December 2006, Application no. 34043/02, par. 34

[517] Supra note 317, par. 85

[518] Supra note 317, par. 86

[519] Supra note 317, par. 87

[520] ICC, TC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v.Thomas Lubanga Dyilo, Decision giving notice to the parties and participants that the legal

In the ACs view, the most obvious obstacle to the TC's interpretation of reg. 55 ICC Reg. is art. 74(2) ICC St. The second sentence of that provision reads as follows: The decision [of the TC at the end of the trial] shall not exceed the facts and circumstances described in the charges and any amendments to the charges.[521]

According to the TC's interpretation of reg. 55 ICC Reg., the Chamber could adjudicate, at the end of the trial, not only the facts described in the charges or any amendment thereto but also additional facts that were introduced into the trial through a "change" of their legal characterization under reg. 55 ICC Reg. In the view of the AC, the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (art. 61(5) ICC St.), as well as from background or other information that, although contained in the DCC or the CD, does not support the legal elements of the crime charged. The AC emphasized that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in art. 67(I)(a) ICC St.) The AC considered that this interpretation would result in a conflict with art. 74(2) ICC St. because these additional facts would not have been described in the charges or any amendment thereto. Regulation 1(1) ICC Reg. provides that ICC Reg. must be "read subject to ICC St. and ICC RPE". Thus, any interpretation of reg. 55 ICC Reg. that cannot be reconciled with art. 74(2) ICC St. must be rejected as incorrect.[522]

The drafting history of art. 74 (2) ICC St. also confirms that reg. 55 ICC St. must be limited to the facts and circumstances described in the charges or any amendment thereto. The commentary to the proposal explained that "the Court may not hand down a judgement on acts which have not been included in the indictment or an amendment thereto". Thus, the purpose of the provision was to bind the Chamber to the factual allegations in the charges. The TC's interpretation of reg. 55 ICC Reg. would be inconsistent with that purpose.[523]

Thus, the AC was of the view that art. 74(2) ICC St. confines the scope of reg. 55 ICC Reg. to the facts and circumstances described in the charges and any amendment thereto. Regulation 55 ICC Reg. is consistent with art. 74 (2) ICC St. This latter provision binds the TC only to the facts and circumstances described in the charges or any amendment thereto, but do not make reference to the legal characterization of

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characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2093, par. 27; TC I, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Clarification and further guidance to parties and participants in relation to the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2107, par. 41

[521] Supra note 317, par. 89

[522] Supra note 317, par. 90

[523] Supra note 317, par. 91

these facts and circumstances. It follows a contrario that art. 74 (2) ICC St. does not rule out a modification of the legal characterization of the facts and circumstances.[524]

The interpretation by the TC of reg. 55 ICC Reg. is also in conflict with art. 61(9) ICC St. The AC is persuaded by the arguments of Mr Lubanga Dyilo and the Prosecutor that new facts and circumstances not described in the charges may only be added under the procedure of art. 61(9) ICC St. The TC's interpretation of reg. 55 ICC Reg. would circumvent art. 61(9) ICC St. and would blur the distinction between the two provisions. As the Prosecutor noted, the incorporation of new facts and circumstances into the subject matter of the trial would alter the fundamental scope of the trial. The AC observes that it is the Prosecutor who, pursuant to art. 54(1) ICC St., is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to art. 61(1) and (3) ICC St., proffers charges against suspects. To give the TC the power to extend proprio motu the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under ICC St. The AC therefore found that the TC's interpretation of reg. 55ICC Reg. is incompatible with art. 61(9) ICC St. The AC also sees merit in the argument of the Prosecutor that the TC's interpretation is inconsistent with reg. 52 ICC Reg.[525]

Regulation 52 ICC Reg. thus stipulates that the DCC shall contain three distinct elements: information identifying the accused person, a statement of the facts, and the legal characterization of these facts. The distinction between facts and their legal characterization should be respected for the interpretation of reg. 55 ICC Reg. as well. The text of reg. 55 ICC Reg. only refers to a change in the legal characterization of the facts, but not to a change in the statement of the facts. This indicates that only the legal characterization (reg. 52(c) ICC Reg.) could be subject to change, but not the statement of the facts (reg. 52(b) ICC Reg.). The AC found that the TC's interpretation of reg. 55 ICC Reg. does not follow this distinction, which indicates that it is incorrect. The AC was of the view that reg. 55 ICC Reg., if properly interpreted and applied, is consistent with internationally recognized human rights.[526]

Mr Lubanga Dyilo submitted that reg. 55 ICC Reg. only allows the re characterization of facts to 'lesser included offences', but does not allow for the addition of new offences to those listed in the charges, even if they are based on the facts and circumstances described in the charges; nor does reg. 55 ICC Reg. allow that the legal characterization be modified to a more serious offence. In his view, the addition of an offence or the replacement of a lesser offence with a more serious offence would require an amendment of the charges, which is in the exclusive jurisdiction of the PTC. He refers to the Kupreskic Trial Judgment and to the accused person's right to

[524] Supra note 317, par. 93
[525] Supra note 317, par. 94-96
[526] Supra note 317, par. 97, 98

be informed "prior to the commencement of the trial, of the precise legal characterization of the facts. [527]

The AC noted that the question raised by Mr Lubanga Dyilo goes beyond the scope of the first issue on appeal, which is limited to the question of whether reg. 55 ICC Reg. may be used to include additional facts and circumstances not described in the charges or any amendment thereto. The Chamber noted, however, that the text of reg. 55 ICC Reg. does not stipulate, beyond what is contained in sub regulation 1, what changes in the legal characterization may be permissible. The AC will not consider the issue any further, but notes, in any event, that the particular circumstances of the case will have to be taken into account. In addition, as stated above, the modification of the legal characterization is limited by the facts and circumstances described in the charges or any amendment thereto. Furthermore, reg. 55 (2) and (3) ICC Reg. must be respected in order to safeguard the rights of the accused, and the change in the re-characterization must not lead to an unfair trial.[528]

The TC did not rule as to how the legal characterization of the facts could be changed. The TC merely stated: A condition for triggering the mechanism of reg. 55(2) ICC Reg. is the Chamber's finding that the legal characterization of facts may be subject to change. The submissions of the legal representatives of the victims and the evidence heard so far during the course of the trial persuade the majority of the Chamber that such a possibility exists. Accordingly, the parties and participants have a right to receive early notice.[529]

In the Clarification, the TC stated that the "'additional facts' must in any event have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges."[530]

The arguments raised by Mr Lubanga Dyilo under the second issue are in two parts: first, he make detailed submissions in support of the argument that the facts and circumstances described in the charges do not establish the elements of the crimes defined in art. 7(1)(g), art. 8(2)(b)(xxii), art. 8(2)(e)(vi), art. 8(2)(a)(ii) and art. 8(2)(c)(i) ICC St., and that therefore the modification of the legal characterization of facts contemplated by the TC would amount to an (impermissible) amendment of the charges. Second, he avers that the addition of charges at this stage of the proceedings would violate his fundamental rights.[531]

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[527] Supra note 494, par. 20-22
[528] Supra note 317, par. 100
[529] Supra note 488, par. 33
[530] ICC, TC I, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Clarification and further guidance to parties and participants in relation to the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2107, par. 8
[531] Supra note 494, par. 36-57

The TC's explanations in the Impugned Decision and the Clarification regarding the facts and circumstances that it would take into account for the change in the legal characterization were extremely thin. The TC neither provided any details as to the elements of the offences the inclusion of which it contemplated, nor did it consider how these elements were covered by the facts and circumstances described in the charges. Thus, if it considered the second issue, the AC would, for the first time, make an assessment of these questions in its judgment on the appeals, even though the TC currently is in the best position to assess the charges and the evidence that has been presented. [532]

On an appeal pursuant to art. 82(1) (d) ICC St., the AC may confirm, reverse or amend the decision appealed (r. 158(1) ICC RPE). In the present case, for the reasons given above, the AC was of the view that the TC erred in law when finding that reg. 55 ICC Reg. contained two separate procedures and that it was permissible under reg. 55(2) and (3) ICC Reg. to include additional facts and circumstances that are not described in the charges. This error materially affected the Impugned Decision[533]. The AC therefore considered it appropriate to reverse the Impugned Decision.[534]

For the foregoing reasons and on the basis of the evidence submitted and discussed before the Chamber at trial, and the entire proceedings, pursuant to Article 74(2) of the Statute, the Chamber found Mr Thomas Lubanga Dyilo guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003.[535]

[532] Supra note 317, par. 109
[533] Supra note 488
[534] Supra note 317, par. 112
[535] Supra note 16, par. 1358

CONCLUSIONS

The drafters of the ICC St. framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited - at the outset - the ability of the Chamber to assess evidence "freely". Instead, the Chamber is authorized by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness.[536]

The Chamber assesses both the relevance and the probative value of the evidence regardless of its type (direct or indirect).[537] In evaluating the Motions, the Chamber assesses the relevance of the material, then determines whether it has probative value and finally weighs its probative value against its potentially prejudicial effect.[538]

It is wrong to presume that, ab initio, all indirect evidence is unreliable. “Indirect” is just another way of identifying evidence as hearsay or circumstantial evidence. Neither category is presumptively excludable on reliability grounds. [539]

The Chamber identifies the evidence either as direct or indirect, the latter encompassing hearsay evidence, reports of international (UN) and non-governmental organizations (NGOs), as well as reports from national agencies, domestic intelligence services and the media.[540]

In considering indirect evidence, the Chamber follows a two-step approach. First, as with direct evidence, it assesses its relevance and probative value. Second, it verifies whether corroborating evidence exists, regardless of its type or source. The Chamber is aware of r. 63(4) ICC RPE, but finds that more than one piece of indirect evidence, which has low probative value, is preferable to prove an allegation to the standard of substantial grounds to believe.[541]

As a general rule, a lower probative value will be attached to indirect evidence than to direct evidence. The Chamber does not disregard it, but is cautious in using it to support its findings. The Chamber highlights that, although indirect evidence is commonly accepted in jurisprudence, the decision of the Chamber on the confirmation of charges cannot be solely based on one such piece of evidence.[542]

In Muthaura case, the accused agreed with the Chamber’s finding that NGO reports are indirect evidence, but argued that the Majority erred by using NGO reports as

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[536] Supra note 91, par. 24
[537] Supra note 18, par. 44
[538] Supra note 89, par. 14
[539] Supra note 17, par. 48
[540] Supra note 33, par. 82; Supra note 18, par. 47
[541] Supra note 33, par. 87; Supra note 17, par. 45; Supra note 18, par. 52
[542] Supra note 18, par. 51; Supra note 33, par. 86; Supra note 25, par. 28

corroboration for other NGO reports. Against this backdrop, Muthaura sought leave to appeal "the legal question of relying on indirect evidence to corroborate other indirect evidence".[543] The Majority stated that it assessed the relevance and probative value of indirect evidence and that probative value was determined in light of the totality of the evidence. The Majority evaluated NGO reports in the context of other evidence offered to prove or disprove a given factual proposition; through this process, the Chamber determined the reliability and probative value of each piece of evidence.[544]

In Gombo case the PTC II being relied on several pieces of indirect evidence has made its determination pursuant to art. 61(7) ICC St. that even if the evidence as a whole relating to one charge lacks direct evidence and is only supported by pieces of indirect evidence, provided that their probative value allows the Chamber to determine that the threshold established in that article is met.[545] In addition to direct evidence, the Chamber took note that indirect evidence, such as hearsay evidence and several NGO[546] and UN reports[547] were of a corroborating nature.[548]

In Katanga and Ngudjolo case the purported reasons for avoiding onsite investigations were similar to those raised in Lubanga: security problems, health risks, volatile and unstable situation with active militia, the security of the OTP personnel and the safety of potential informants. A number of issues in relation to investigations spoke of security and health risks. The Prosecution found similar solutions as in Lubanga: reliance on third-party organizations and intermediaries. The Chamber accepted there were grave grounds for concern, but ruled that the trial should continue, finding that the impact of the involvement of the intermediaries on the evidence in the case, as

[543] Supra note 17, par. 46

[544] Supra note 17, par. 47

[545] Supra note 18, par. 54, 94, 101, 123

[546] AI report: "Central African Republic, Five months of war against women", AI reports of an international medical charity, summaries of testimonies of rape victims, information on 300 reported complaints of rape by CAR civilians, FIDH report: "Crimes de Guerre en République Centrafricaine Quand les éléphants se battent, c'est l'herbe qui souffre'' (in this report FIDH provides information with reference to an NGO in the field that 79 women have been victims of sexual violence. In its report of October 2006 "République Centrafricaine, Oubliées, stigmatisées: la double peine des victimes de crimes internationaux"). FIDH provides further testimonies of civilians who have been victims of rape by MLC soldiers which it collected during its fact-findings missions in the CAR, an FIDH press release

[547] UNRC: "Central African Republic Weekly Humanitarian Update". It is reported that the UNDP project had identified 248 women and girls that fell victim to rape and other forms of physical violence and humiliations in the hands of the MLC troops. AI confirms that the UNDP project started on 28 November 2002 with the aim to provide emergency medical care to survivors of rape, AI report:"Central African Republic, Five months of war against women"

[548] Supra note 18, par. 186

well as any prosecutorial misconduct or negligence, would be matters for its final judgment.[549]

The cooperation of entities other than States has proved indispensable in practice. International forces (IFOR) have carried out most of the arrests for the ICTY. Arrest warrants have sometimes been issued directly to non-State entities instead of States.[550] The UN peacekeeping forces in the Democratic Republic of Congo (MONUC) were given an explicit mandate to cooperate with international efforts to bring perpetrators to justice.[551]

In Mbarushimana case also for the purpose of the confirmation hearing, the OTP relied on NGO and UN reports, often one single report in relation to each attack charged.[552] Deficient investigations were partly the reason that the PTC did not confirm the case against Mbarushimana.[553]

The PTC in Abu Garda and by majority in Kenya I and II have taken the position that investigative failures cannot, by themselves, be a ground to decline to confirm the charges, but "may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the 'substantial grounds to believe' threshold."[554] Up until the confirmation of charges hearing, the Kenyan investigations relied primarily on the investigations carried out by the Commission of Inquiry into the Post-Election Violence an initiative funded jointly by the Kenyan government and the multi-donor Trust Fund for National Dialogue and Reconciliation. The Waki Commission was tasked with investigating the violence that erupted in Kenya following the disputed presidential election held in December 2007. In addition, the OTP benefited from detailed reports compiled by the Kenyan National Commission on Human Rights (KNCHR), as well as by other human rights organizations such as Human Rights Watch (HRW).[555] The Prosecutor indicated that, now that the charges

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[549] ICC, TC I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v .Thomas Lubanga Dyilo, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", ICC-01/04-01/06-2690-Red2, par. 74–92

[550] Supra note 193

[551] Supra note 194

[552] ICC, PTC I, Prosecutor v. Callixte Mbarushimana, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, par. 117–18, 120

[553] ICC, PTC I, Situation in the Democratic Republic of the Congo in the case of Prosecutor v. Callixte Mbarushimana, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, par. 113-136

[554] Supra note 47, par. 46-48; ICC, PTC II, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, par. 51–52; Supra note 33, par.63, 64

[555] HRW Report, Ballots to Bullets: Organized Politicalviolence And Kenya's Crisis Of Government, Mar. 2008(20), available at http://www.hrw.org/reports/2008/kenya0308/kenya0308web.pdf ; See, e.g., ICC, PTC II, Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, William Samoei Ruto Defence Brief Following the Confirmation of Charges Hearing, ICC-01/09-01/11-355, par. 28–29

were confirmed, the prosecution would need to move into Kenya to investigate the crime base and engage with the victims.[556]

Whilst accepting the assertion that onsite investigations are impossible, is held that "the ICC St. does not include an absolute and an all-encompassing right by the Prosecution and the Defence to on-site investigations." Accordingly, the Chamber held, it "should not automatically conclude that a trial is unfair, and stay proceedings as a matter of law, in circumstances where States would not allow Defence (or prosecution) investigations in the field even if, as a result, some potentially relevant evidence were to become unavailable".[557] This failure to investigate has led to the Prosecution's reliance on statements of witnesses and informants outside Sudan, as well as third-party evidence, including documents provided by the UN International Commission of Inquiry on Darfur.[558]

If has failed to investigate properly, this will certainly have a bearing on the quality and sufficiency of the evidence presented and the matter will be finally decided by way of an examination of the said evidence pursuant to art. 61(7) ICC St. Therefore, under no circumstances will a failure on the part of the Prosecutor to properly investigate, automatically justify a decision of the Chamber to decline to confirm the charges, without having examined the evidence presented. In other words, the scope of determination under art. 61(7) ICC St. relates to the assessment of the evidence available and not the manner in which the Prosecutor conducted his investigations.[559]

The decision to confirm or decline to confirm the charges based on the Disclosed Evidence is made in light of the evidentiary threshold applicable at the pre-trial stage, which is lower than the threshold applicable at the trial stage.[560] For the purposes of a warrant of arrest or a summons to appear it must be proven that "there are reasonable grounds to appear that the person has committed a crime within the jurisdiction of the Court (art. 58(1)(a) ICC St.). For the confirmation of charges it must be proven that there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged (art. 61(7) ICC St.). Finally, in order to convict the accused the Court must be convinced of the guilt of the accused beyond reasonable doubt (art. 66(3) ICC St.). The burden of proof lies indeed with the Prosecutor who is statutorily called, pursuant to art. 61(5) ICC St., to support each charge - and therefore each and every constituent element of the crimes and the mode

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[556] Press Conference held by Luis Moreno-Ocampo on January 24, 2012 relating to the PTC's decision on the confirmation of the charges in Kenya I and II, issued on January 23, 2012, available at http://www.youtube.com/watch?v=0-WYkNYXvug&feature=relmfu

[557] ICC, TC IV,Situation in Darfur, Sudan in the case of the Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus, Decision on the Defence Request for a Temporary Stay of Proceedings, ICC-02/05-03/09-410

[558] ICC, PTC I, Situation in Darfur, Sudan, Prosecutor's Responses to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, ICC-02/05-16, par. 20

[559] Supra note 33, par. 63

[560] Supra note 18, par. 43

of liability as charged - with sufficient evidence to convince the Chamber to the requisite threshold.[561]

In accordance with art. 61(1) ICC St., the purpose of the confirmation hearing is "to confirm the charges on which the Prosecutor intends to seek trial"[562] to filter the cases that should go to trial from those which should not.[563] Throughout the proceedings, the Chambers consistently reiterated this principle and asserted that the confirmation hearing has a limited scope and purpose and should not be seen as a "mini-trial" or a "trial before the trial."[564] At no point should PTC exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect. The Chamber, therefore, shall not evaluate whether the evidence is sufficient to sustain a future conviction: Such a high standard is not compatible with the standard under art. 61(7) ICC St.[565] This view is consistent with the fact that, given the limited purpose of the confirmation hearing, the evidentiary threshold at the pre-trial stage is lower than that applicable at the trial stage. In more general terms, the Prosecutor is not required to tender into the record of the case more evidence than is, in his view, necessary to convince the Chamber that the charges should be confirmed.[566] The evidentiary threshold to be met for the purposes of the confirmation hearing cannot exceed the standard of "substantial grounds to believe", as provided for in art. 61(7) ICC St.[567]

It has been stated that for purposes of confirmation, the PTC should accept as dispositive the Prosecution's evidence, so long as it is relevant. It should avoid attempting to resolve contradictions between the Prosecution and Defence evidence, because such resolution is impossible without a full airing of the evidence from both sides and a careful weighing and evaluation of the credibility of the witnesses. That will occur at trial.[568] The Chamber found that, at the pre-trial stage, the Prosecutor needs to provide not all but only sufficient evidence which allows the Chamber to determine whether there are substantial grounds to believe that the suspect committed each of the crimes charged. Therefore, the Chamber is of the view that the expression "include, but (...) not limited to" does not infringe the rights of the Defence at this stage.[569]

But, gathering enough evidence to reach the "sufficiency standard", within the meaning of art. 61(7) ICC St., maybe in the expectation or hope that in a further phase, after the confirmation proceedings, additional and more convincing evidence may be assembled to attain the 'beyond reasonable doubt' threshold, as required by art.

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[561] Supra note 19, par. 26
[562] Supra note 291, par. 14
[563] Supra note 37, par. 61
[564] Supra note 30, par. 64
[565] Supra note 295
[566] Supra note 286, par. 40
[567] Supra note 30, par. 62
[568] Supra note 33, par. 67
[569] Supra note 18, par. 66

66(3) ICC St., as tempting as it might be for the Prosecutor, would be risky, triggering in the same time reg. 55 ICC Reg. and art. 74 ICC St.: if after the confirmation of the charges it turns out as impossible to gather further evidence to attain the decisive threshold of 'beyond reasonable doubt'[570] or if after the confirmation of charges new evidence reveal new facts or different characterization of existent facts or existent evidence can be interpreted in a different manner, as a result of in depth analysis, in order to establish different facts.

The TC is bound by a stricter standard of assessment in the determination of guilt. It must be convinced ‘‘beyond reasonable doubt’’ (art. 66(3) ICC St.). Moreover, it cannot be assumed that the PTC enjoys the exclusive responsibility to fix the content of the proceedings. The TC enjoys considerable flexibility in the organization of trial. It may, in particular, refer ‘‘preliminary issues to the PTC’’, (art. 64(4) ICC St.) “exercise any functions of the PTC referred to in art. 61(11) ICC St.”, (art. 64(6) ICC St.) and ‘‘order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties’’(art. 64(6)(d) ICC St.).[571]

But, as the TC is bound by a stricter standard of assessment in the determination of guilt -it must be convinced ‘‘beyond reasonable doubt’’ (art. 66(3) ICC St.)- it seems that the Chamber evaluates the contribution of indirect evidence in the same way as direct evidence, paying significant attention to issues of admissibility, relevance and probative value, bearing, nevertheless, always in mind that indirect evidence is attributable with a lower probative value and in many cases is of corroborating nature. A case by case analysis is in fact realized with significant caution in the use of such pieces of evidence even in the case of the modification of the legal characterization of facts.

Additionally to the abovementioned of indirect evidence, concerning admissibility, the Chamber recalls that neither the ICC St. nor ICC RPE provide that a certain type of evidence is per se inadmissible. The Chamber may, pursuant to art. 69(4) ICC St., and shall, pursuant to art. 69(7) ICC St. and r. 63(3) ICC RPE, rule on the admissibility of the evidence, in accordance with internationally recognized human rights as provided for in art. 21(3) ICC St.,[572] on an application of a party or on its own motion if grounds for inadmissibility set out in the aforesaid provisions appear to exist.[573] The ICC St. vests all Chambers, regardless of the stage of proceedings, with discretion to freely assess the evidence presented by the parties. Pursuant to art. 69(4) ICC St., the Chamber has discretion to "rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the

[570] Supra note 37, par. 52
[571] Supra note 318
[572] Supra note 105, par. 110
[573] Supra note 18, par. 46

testimony of a witness, in accordance with the ICC RPE."[574] However, this broad discretion of the Chamber should not be exercised arbitrarily or without limitations. Consequently, in accordance with art. 69(4) (7) ICC St., the Chamber's discretion is limited by the relevance, probative value, and admissibility of each piece of evidence.[575]

The Chamber has the paramount principle of free assessment of evidence as enshrined in art. 69(4) ICC St. and r. 63(2) ICC RPE and these provisions are equally applicable in all stages of the proceedings.[576] In determining whether there are substantial grounds to believe that the suspect committed each of the crimes charged, the Chamber is not bound by the parties characterization of the evidence. Rather, the Chamber will make its own independent assessment of each piece of evidence.[577] There are no automatic grounds for exclusion in the ICC St. or ICC RPE.[578] Instead, the Chamber has the discretion to weigh the probative value of each particular item of evidence against the potentially prejudicial effect of its admission. This is a balancing test which must be carried out on a case-by-case basis.[579]

The application and interpretation of the law 'must be consistent with internationally recognized human rights' (art. 21(1)(b)(3) ICC St.).[580] Under art. 69(7) ICC St. evidence obtained by means of a violation of the ICC St. or internationally recognized human rights is not admissible if a) the violation casts substantial doubt on the reliability of the evidence; or b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. Thus, the Chamber must determine whether the evidence was obtained in violation of internationally recognized human rights.[581] Article 69(7) ICC St. rejects the notion that evidence procured in violation of internationally recognized human rights should be automatically excluded. Consequently, the judges have the discretion to seek an appropriate balance between the ICC St.'s fundamental values in each concrete case.[582] According to some commentators, "some delegations wanted to exclude evidence obtained by means of a violation of human rights, but this formulation was regarded as too broad. "The drafters of the ICC St. opted for a narrower formula,

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[574] ICC, PTC I, Situation in Darfur, Sudan in the case of the Prosecutor v. Baharidriss Abu Garda, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, par. 6
[575] Supra note 18, par. 62
[576] Supra note 33, par. 73
[577] Supra note 33, par. 75
[578] Supra note 91, par. 29: There should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall
[579] Supra note 89, par. 15
[580] See e.g. ICC, AC, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, par. 36–9
[581] Supra note 105, par. 70
[582] Supra note 105, par. 84

under which the Court "will have to distinguish between minor infringements of procedural safeguards and heavier violations".[583]

One fundamental feature of fair trial –a manifestation of 'equality of arms'– is the disclosure of the Prosecutor's evidence to the accused, allowing the latter to prepare for trial.[584] Estimated volume of evidence must be disclosed by the parties, as well as the Defense right to have adequate time and facilities to prepare, in accordance with art. 67(l)(b) ICC St.[585] The parties are requested to disclose different types of evidence in accordance with art. 67(2) ICC St. and rr. 76 to 79 RPE and disclose their evidence in due time before the Hearing in accordance with r. 121(3)(4) and (6) RPE.[586]

A textual interpretation of art. 54(3)(e) ICC St. indicates that the Prosecutor may only rely on the provision for a specific purpose, namely in order to generate new evidence. This interpretation is confirmed by the context of art. 54(3)(e) ICC St.. It follows from art. 54(1) ICC St. that the investigatory activities of the Prosecutor must be directed towards the identification of evidence that can eventually be presented in open court, in order to establish the truth and to assess whether there is criminal responsibility under the ICC St.[587]

If the Prosecutor has obtained potentially exculpatory material on the condition of confidentiality pursuant to art. 54(3)(e) ICC St., the final assessment as to whether the material in the possession or control of the Prosecutor would have to be disclosed pursuant to art. 67(2) ICC St., had it not been obtained on the condition of confidentiality, will have to be carried out by the TC and therefore the Chamber should receive the material. The TC (as well as any other Chamber of this Court, including this AC) will have to respect the confidentiality agreement and cannot order the disclosure of the material to the defence without the prior consent of the information provider.[588] This understanding of the last sentence of art. 67(2) ICC St. coincides with the overall role ascribed to the TC in art. 64(2) ICC St. to guarantee that the trial is fair and expeditious, and that the rights of the accused are fully respected. It is furthermore confirmed by the jurisprudence of the ECHR, that the right to a fair trial requires that "the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused".[589]

[583] Supra note 130; Supra note 105, par. 87
[584] Supra note 3, p.462
[585] Supra note 33, par. 8
[586] Supra note 18, par. 32
[587] Supra note 67, par. 41
[588] Supra note 67, par. 3
[589] Supra note 69

But the AC also held that the confidentiality agreement must be respected and hence that other counter-balancing measures must be considered if the provider does not agree to disclosure.[590]

Based on art. 21(3) ICC St. and the responsibility to ensure the fairness of the proceedings, a conditional stay of the proceedings was considered to be an appropriate remedy when disclosure of exculpatory evidence was prevented by the provider of the material. The TC based on art. 64(2), 21(3) ICC St. stated that: If, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary - indeed, inevitable - that the proceedings should be stayed. There is, therefore, no prospect, on the information before the Chamber, that the present deficiencies will be corrected.[591] Neither the ICC St. nor the ICC RPE provides for a "stay of proceedings" before the Court. Nevertheless, it follows from art. 21(3) ICC St.[592]

In Lubanga case material has been collected on a large scale, in particular on the basis of the ICC-UN Relationship Agreement and the MONUC Memorandum of Understanding. The Prosecutor relied on the expectation that the information providers would, at a later stage, agree to the lifting of the confidentiality, should this become necessary.[593]

Controversial questions in the negotiations were whether full disclosure of the evidence for trial should take place before or after the confirmation hearing and whether the Chambers should have access to a ‘dossier’.[594] The RPE leave room for different interpretations. But it is important to note that the confirmation and the trial serve different purposes and that the evidentiary requirements differ, which is also reflected in the rules on pre-confirmation disclosure.[595] Consequently, such pieces of indirect evidence within the context of confidentiality can cause numerous problems at the Court and more specifically at TC, with a crucial duty to convict the accused. Taking into consideration that indirect evidence has already a lower probative value than direct evidence, the fact that they are not disclosed to the parties renders its function questionable and multiplies the concerns for a fair trial. Additionally, such pieces of evidence whose confidentiality can be lifted only after the confirmation of charges can contribute significantly to the modification of the legal characterization of facts after the confirmation of charges, as new facts can be emerged or a possible

[590] Supra note 67, par. 3, 43–8
[591] Supra note 67, par. 58
[592] Supra note 67, par. 77
[593] Supra note 67, par. 44
[594] For opposing views, see contributions by Helen Brady and Gilbert Bitti in Horst Fischer/Claus Kress/Sascha Rolf Lüder (eds), International and National Prosecution of Crimes under International Law: Current Developments, Verlag Arno Spitz, Berlin, 2001, p. 261–88
[595] Supra note 3, p.464

different characterization of facts can occur from the TC based on the disclosure of evidence.

Indeed, ICC Judges generally view NGO and UN reports with scepticism. They tend to decline to admit them into evidence or accredit them little, if any, evidential weight. In the Special Court for Sierra Leone, Justice Robertson Q.C. said the following: "Courts must guard against allowing Prosecutions to present evidence which amounts to no more than hearsay demonization of defendants by human rights groups and the media. The right of sources to protection is not a charter for lazy Prosecutors to make a case based on second-hand media reports and human rights publications."[596]

It has been stated that these organizations have a very different mandate, and do not apply the standard of proof beyond reasonable doubt.[597] Nor do they share the Prosecutor's obligation to "investigate incriminating and exonerating circumstances equally" (art. 54(1)(a) ICC St.).[598]

It is well settled in the practice of the ICTY/ICTR that hearsay evidence is admissible. Thus, relevant out of Court statements which a TC considers probative are admissible under r. 89(C) of ICTY.[599] This was established in 1996 by the Decision of TC II in Prosecutor v. Tadic[600] and followed by TC I in Prosecutor v. Blaskic.[601] The Chamber exercised its discretion in determining the admissibility and probative value of all the evidence in accordance with the statutory framework of the Court, as previously set out in the Lubanga Decision. Accordingly, the Chamber was of the view that any challenges to hearsay evidence may affect its probative value, but not its admissibility.[602] While hearsay evidence is not per se inadmissible, it is well established that a TC must be cautious in considering such evidence.[603] The Chamber should not rely solely on anonymous hearsay evidence. However, the Chamber does hold that information based on anonymous hearsay evidence may still be probative to the extent that it (i) corroborates other evidence in the record, or (ii) is corroborated

[596] Supra note 270

[597] See, e.g., Lyal S. Sunga, How Can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?, International Journal of Human Rights, volume 15, No 2, 2011, available at http://www.casematrixnetwork.org/fileadmin/documents/L._Sunga__How_Can_UN_Special_Procedures_Sharpen_ICC_Fact-Finding.pdf ; Human Rights First, The role of human rights NGO's in relation to ICC investigations, Sept. 2004, p. 189-90, available at http://www.iccnow.org/documents/HRF-NGO_RoleInvestigations_0904.pdf

[598] Supra note 272

[599] Also Rule 89(B): In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. Rule 89(C): A Chamber may admit any relevant evidence which it deems to have probative value. Rule 89(D): A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial

[600] Supra note 26

[601] Supra note 27

[602] Supra note 30, par. 137

[603] Supra note 261

by other evidence in the record.[604] As has been stated: there is nothing in the ICC St. or ICC RPE which expressly provides that the evidence which can be considered hearsay from anonymous sources is inadmissible per se. Accordingly, the Chamber considers that objections pertaining to the use of anonymous hearsay evidence do not go to the admissibility of the evidence, but only to its probative value.[605]

Furthermore, in the ICC, has been established an expression of the iura novit curia principle, allowing a Chamber to 'modify the legal characterization' of the facts: reg. 55 of the ICC Reg. That is, to determine that the facts and circumstances pleaded in the charges should be characterized as a different crime or a different form of participation from that which the Prosecutor has chosen.[606] Under reg. 55(1) ICC Reg., the legal characterization of the facts may be altered in a decision rendered by a Chamber under art. 74 ICC St.[607] Article 74(2) ICC St. regulates the ''requirements for the decision'' of the TC. It reads: ''The TC's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendment to the charges''. This provision does not contain an express validation of the concept of the legal qualification of facts. But it may be interpreted as an implicit recognition of the possibility for the TC to interpret the facts submitted to it in different legal terms than described in the indictment.[608]

Taking into account the role of the PTC as a filter for the trial, one may argue that the charges are ''frozen'' after their confirmation by the PTC (''freezing theory'') – an interpretation which leaves little flexibility to the TC. Alternatively, one might argue that the powers of the TC are broad enough to allow a change of the content of the charges at any time at trial by way of an amendment of the charges (''amendment theory''). Finally, an intermediate approach acknowledges the power of TC to change the legal classification of facts at trial, while excluding its authority to deviate from the facts described in the charges.[609]

The adoption of the concept of the legal characterization of facts is in line with both the legal framework of the ICC and international human rights law. Two aspects deserve closer attention in this regard. First of all, reg. 55 ICC Reg. does not institute a new procedural device per se. It simply clarifies an interpretative choice offered to the judges of the Court under art. 74(2) ICC St. Moreover, the regulation addresses the human rights concerns raised by the ICTY TC in Kupreskic. It grants the accused not only the minimum level of protection required under international human rights law and national Codes of Criminal Procedure, but provides additional substantial safeguards to ensure that the rights of the Defense are adequately protected in all

[604] Supra note 30, par. 140
[605] Supra note 30, par. 118; Supra note 105, par. 101, 103
[606] Supra note 3, p. 458
[607] Supra note 146, par. 11
[608] Supra note 318
[609] Supra note 318

circumstances, in particular, in situations in which the legal re-characterization of the facts confronts the accused with new or different crimes in the course of the trial.[610]

Regulation 55 ICC Reg. covers different situations (re-qualification of the modalities of the same crime, re-characterization of facts as a different crime) by giving the Chamber authority to change the legal characterization of facts to accord with ‘‘the crimes under arts. 6, 7, 8 ICC St. ’’ or with ‘‘the form of participation of the accused under arts. 25 and 28 ICC St.’’. It should be noted that an ‘‘increase in qualification’’ of crimes by the TC is not excluded by art. 61(9) ICC St. All the core crimes carry the same penalty (art. 77 ICC St.). A change in legal qualification does herefore not necessarily entail a conviction for ‘‘a more serious crime’’, even if the conduct of the accused is qualified as genocide rather than as a crime against humanity. Furthermore, a qualification of conduct as a different legal crime does not constitute an ‘‘additional charge’’ or a ‘‘more serious charge’’ within the meaning of art. 61(9) ICC St.[611]

Two international guarantees for the accused must be preserved in the ‘‘determination of any charge’’, including the process of the legal characterization of facts, in international criminal proceedings: the right of the accused to ‘‘be informed promptly and in detail of the nature, cause and content of the charge’’ and the right ‘‘to have adequate time and facilities for the preparation of the defense’’. Regulation 55 ICC Reg. was drafted in the light of these two guarantees. Regulation 55 ICC Reg. stipulates that the TC may change the legal characterization of facts “at any time during the trial.” The wording implies that there is no temporal limitation to “triggering” this provision since the rights of the accused set forth in paragraphs 2 and 3(a) and (b) ICC Reg. are effectively guaranteed. Two lines of arguments may be made to support the view that the TC is entitled to modify the classification of the offences contained in the charges. One interpretative option is to infer the concept of the legal characterization of facts specifically from the distinction between the charges and ‘‘the facts and circumstances described in the charges’’ in art. 74(2) ICC St. and the right of the TC to exercise the powers inherent in its functions. Another possible argument is to derive the right to legally re-classify the facts from the general powers of the TC under art. 64(6) ICC St. The distinction between the ‘‘the facts and circumstances described in the charges’’ and the charges in the context of Part 6 ICC St. suggests that only facts and circumstances in the charges are binding on the TC, but not the legal characterization of these facts by the Prosecutor. This flexibility in interpretation offers the TC the possibility of changing the legal classification of facts. It is possible to change the legal characterization of a crime without changing the charges. The charges are composed of two elements: a factual element, the ‘‘statement of the facts, including the time and place of the alleged crimes’’, and a legal element, the ‘‘legal characterization of facts’’ (reg. 52, lit. b ICC Reg.). If a Chamber modifies only the second component, the legal characterization of facts,

[610] Supra note 318
[611] Supra note 318

while basing its assumptions on the facts set out in the charges, it does not automatically amend the charges.[612]

Another provision which indicates that a TC may be entitled to adopt the principle of the legal characterization of facts in practice is art. 64(6) lit (f) ICC St.[613] It allows the judges, in particular, to issue practice directions to the parties in areas where the text of ICC St. is silent.[614] Article 52 ICC St. also authorizes the judges of the Court to adopt regulations for the ''routine functioning'' of the Court. This provision entrusts judges with a mandate (''shall'') to elaborate provisions relating to the judicial proceedings before the Court.[615] Article 52 ICC St. must be read in conjunction with art. 4 ICC St., which gives the Court the powers necessary for the exercise of its functions. But it is broad enough to allow for the adoption of regulations which clarify elements of the trial procedure or provide the capacity to function effectively as a Court, including a norm on the treatment of the legal characterization of facts. [616] Finally, one may argue that the principle of the legal qualification of facts is covered by the concept of implied powers. The ICC Reg. are not only an instrument to streamline proceedings, but also a mechanism to enable the Court to exercise its powers effectively. The TC will have to deal with situations in which the facts establish at the trial stage that a different crime or a different sub-category of crime has been committed. The possibility of changing the legal characterization of facts may, in such circumstances, be a power necessary for the TC to effectively perform its functions under art. 64 ICC St.[617]

In Lubanga case the AC concluded that the modification provisions, while compatible with the ICC St. and the defendant's right to a fair trial, had been incorrectly applied by the Majority of the TC in that they may not be used to exceed the facts and circumstances described in the charges or any amendment thereto.[618]

Towards these directions the ICC has been dealt with Katnga case when it had to determine on the mode of liability of Germain Katanga. Initially, the PTC confirmed the charges against Germain Katanga within the meaning of art. 25(3)(a) ICC St., willful killing constituting a war crime (art. 8(2)(a)(i) ICC St.); murder constituting a crime against humanity (art. (7)(1)(a) ICC St.); the war crime of directing an attack against a civilian population as such or against individual civilians not taking direct

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[612] Supra note 318

[613] See Frank Terrier, Powers of the Trial Chamber, in The Rome Statute Of The International Criminal Court: A Commentary, Antonio Cassese et al., Vol. II, eds. 2002

[614] Supra note 318

[615] The Report of Judges on the Regulations defines ''routine functioning'' as encompassing ''every step, deed or action that is incidental to the invocation and exercise of the Court's jurisdiction''

[616] Supra note 318

[617] Supra note 318

[618] Supra note 317,; See also ICC, TC I, Situation the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga, Decision on the Legal Representatives' Joint Submissions conceming the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-2223

part in hostilities (art. 2(b)(i) ICC St.); the war crime of destroying property (art. 8(2)(b)(xiii) ICC St.); the war crime of pillaging (art. 8(2)(b)(xvi) ICC St.); sexual slavery constituting a war crime (art. 8(2)(b)(xxii) ICC St.) and a crime against humanity (article 7(1)(g) of the Statute); the crime of rape constituting a war crime (art. 8(2)(b)(xxii) ICC St.) and a crime against humanity (art. 7(1)(g) ICC St.).[619]

Upon examining the evidence, it appeared to the Majority of the Chamber, that Germain Katanga's mode of participation could be considered from a different perspective from that underlying the CD and it was therefore appropriate to implement reg. 55 ICC Reg. In the view of TC II, Mr Katanga's liability should have been considered on the basis of art. 25(3)(d) ICC St. (complicity in the commission of a crime by a group of persons acting with a common purpose) and no longer solely on the basis of art. 25(3)(a) ICC St. (commission of a crime in the form of indirect co-perpetration).[620] The Majority's decision to consider a legal recharacterisation of facts regarding Germain Katanga was based on a thorough review of the evidence in the case[621] as the Chamber highlighted that in making submissions, the Prosecutor is in no wise authorized to seek to introduce new evidence on the proposed alternative mode of liability[622] and the Defense was not afford with a meaningful and reasonable opportunity to conduct investigations between 26 June 2013 and August 2013 to reassemble their small investigatory team, travel to Ituri and investigate, considering also the preventive security situation.[623] Thus, for its determination and re characterization of facts the Chamber re -examined the evidence which was consisted of indirect evidence also, but surely no only on idirect evidence as such reliance is considered as non admissible at this stage of proceedings.[624]

Of significant issue is also the Majority's interpretation of evidence in Katanga case establishing that the attack although directed against the Hema civilian population "as such", with a desire and intention to exterminate them in Bogoro and based on an "anti Hema ideology" constituted a murder in the context of crime against humanity and not a killing members of a group in the context of a crime of genocide. Maybe a different interpretation and evaluation of evidence and facts should have been realized from the beginning or a possible recharacterization of facts as the Majority obviously is stating and reffering more on the elements of genocide than on the elements of crimes against humanity. The difficulcy to prove it by means of evidence and the social stigma of such a characterization should be taken similarly into consideration.

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[619] Supra note 30
[620] Supra note 146, par. 6
[621] Supra note 146, par. 19
[622] Supra note 146, par. 56
[623] Supra note 156, par. 103; ICC, TC II, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga , Defence Further Report on the Security Situation in Eastern DRC, ICC-01/04-01/07-3427, par. 3
[624] See, ICC, TC II, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Bar Table Motion of the Defence of Germain Katanga, ICC-01/04-01/07-3184; Supra note 89

The present research examined numerous cases in our effort to fulfill and cover all the different types of acceptable and inacceptable modification of the legal characterization of facts at ICC, more precisely, firstly, the Katanga case concerning the final acceptance of the modification of his mode of liability based in direct and indirect evidence, secondly, the Gombo case concerning the proposal for the modification of his mode of liability (pending the decision, as during the redaction of the present thesis the final decision has not been taken) based also on direct and indirect evidence and, finally, the Lubanga case concerning the final inacceptance of the additional crimes to those already having confirmed based in direct and indirect evidence. Concluding, the absolute reliance on indirect evidence for the conviction, beyond reasonable doubt, having triggered the proceedures of the legal modification of facts, after the confirmation of charges, cannot in any way be justifiable, although their impact appear and prove to be extremely crucial for criminal proceedings, and, undoubtedly, the practice of the cases of ICC can prove this.

As a conclusion, in front of these numerous human crises around the world the role of the permanent International Criminal Court rests crucial with the significant main duty to put an end to impunity and to preserve peace and justice. For the accomplishment of that duty the Court should continue demonstrating great seriosity towards the rights of the accused and the protection of victims and witnesses, contributing to the evolution of the Intrnational Criminal Law and serving the entire humanity by their decisions. Only through this way will the Court be joined from more countries around the world rendering it a powerful international instrument and erasing any ambiguities that is being confronted until now, by attributing it accuses of broad and unacceptable powers of interpretation that are essentially political and legislative in nature.

TABLE OF ABBREVIATIONS

AC	Appeal Chamber
ACHPR	African Charter on Human and People Rights
ACHR	American Convention on Human Rights
AI	Amnesty Internationale
BBC	British Broadcasting Corporation
CAR	Central African Republic
CD	Confirmation Decision
DCC	Document Containing Charges
EU	European Union
ECHR	European Court for Human Rights
FIDH	Fédération Internationale des ligues des droits de l'homme
IACHR	Inter- American Court of Human Rights
ICC/Court	International Criminal Court
ICC EofC	International Criminal Court Elements of Crimes
ICC Reg.	International Criminal Court Regulations
ICC RPE	International Criminal Court Rules of Procedure and Evidence
ICC St.	International Criminal Court Statute
ICCPR	International Covenant for Civil and Political Rights
ICTR	International Criminal Court for Rwanda
ICTR St.	International Criminal Court for Rwanda Statute
ICTY	International Criminal Court for the former Yugoslavia

ICTY St.	International Criminal Court for the former Yugoslavia Statute
ID	Investigation Division
IFOR	Implementation Force (NATO)
JA	Jeune Afrique
JCCD	Jurisdiction, Cooperation and Complementarity Division
KFOR	Kosovo Force (NATO)
MLC	Mouvement pour la Liberation du Congo
MONUC	UN Organization Mission in the Democratic Republic of the Congo
NGO	Non -Governmental Organization
OAS	Organization of American States
OCODEFAD	Organisation pour la Compassion et le Développement des Familles en Détresse
OTP	Office of the Prosecutor
PTC	Pre Trial Chamber
RFI	Radio France Internationale
SCSL	Special Court for Sierra Leone
SC	Security Council
TC	Trial Chamber
UN	United Nations
UN Charter	United Nations Charter
UNDP	United Nations Development Program
UNRC	United Nations Resident Coordinator

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